EU advancement to the detriment of the ‘best interests’ of the child?

The rules on jurisdiction, recognition and enforcement in Brussels II *bis* and in two Hague Conventions

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to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law,

May 2016

I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of the degree by this or any other University.

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ABSTRACT

'(…) to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with matrimonial proceedings.' [Recital 5 of Brussels II *bis*]

Brussels II *bis* (Council Regulation 2201/2003) complements the Hague Convention on Child Abduction, with its well-established set of international rules and the related definitions based on a considerable body of case law. The interrelation has given rise to difficulties of application and issues of interpretation despite the existence of a set of rules supposed to regulate the complementary structures. Besides this interrelation, the Regulation interacts with the Hague Convention on Child Protection.

Though Brussels II *bis* has been analysed with regard to different single aspects, it has not yet been considered which consequences the actual provisions of the Regulation and the ECJ's decisions have both on the interrelation and its application in the national courts. It has further hitherto not been critically analysed whether the Regulation and the judgments of the ECJ take the right direction to meet the ambitious aim defined in the preamble and throughout the text, respecting the 'best interests' of the child.

Now that a decade of Brussels II *bis* has passed and with a series of pioneer cases decided by the ECJ and with an intervention of the ECtHR in Convention and Regulation cases, the Regulation's effectiveness is worthy of critical consideration.

Despite the existence of some specific rules on the interrelation of the Regulation and the Conventions, their very co-existence gave rise to various interacting situations and questions of interpretation. For courts familiar with the rules of the Convention on Child Abduction and with at least their own respective national case law arising under it, the application of the added layer of rules of the Regulation and the interpretation of its different concepts was and still remains a challenge.

A comparison of Brussels II *bis* with the two international instruments with regard to the role of 'habitual residence' and the suitability of the other central concepts of the provisions for the particularity of family disputes will demonstrate the differences of cases involving the Regulation and those involving the Conventions.

By governing jurisdiction, recognition and enforcement of judgments and orders relating to parental responsibility, the Regulation has a very wide application covering, for example, custody, access, guardianship and even placement of children in foster or institutional care. Further, Brussels II *bis* takes up concepts which lie at the very heart of the application of the Convention on Child Abduction and about which there is extensive jurisprudence.

This thesis will explore a selection of legal issues arising from the interrelation between these private international law instruments dealing with parental responsibility and child abduction which the national courts applying the Regulation are confronted with.

The question whether Brussels II *bis* is an effective instrument which has strengthened the return mechanism under the Convention on Child Abduction and can work hand in hand with the Convention on Child Protection is also important to critically evaluate. It will be considered if the provisions in the Regulation have been drafted clearly enough and the concepts defined so well that they promote the interests of the children concerned, where the provisions are complementing the Convention on Child Abduction, and has learned from the latter's flaws so as to enhance the recognition and enforcement processes related to child abduction.

It will be concluded whether or not the Regulation is an advancement only in terms of having implemented efficient, intra-Community provisions on jurisdiction, recognition and enforcement or a real advancement supporting the 'best interests' of the child(ren), despite the complications of application it has introduced.

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Chapter 1 Introduction

A. General introduction and aims of the work

I. The framework of cross-border family law – an area of constant change

Traditionally, the harmonisation and unification of EC private international law only concerned commercial law and its related areas of civil law, not the law on parental responsibility, abduction or divorce.[1] However, as the number of family disputes not restricted to the borders of one judicial area rose significantly during the last decade[2], the European legislator decided to respond by introducing new legislation in the area of private international law regarding family matters, with the respective competences in the Amsterdam and Lisbon Treaties,[3] in line with the Tampere Conclusions.[4] Against such background, a court inside or outside the European Union seised in a cross-border family law case may have to make decisions on its competence and on the application of the correct provisions: first, it must decide whether or not the provisions of

[1] Hondius, E., 'Towards a European Ius Commune: The Current Situation in Other Fields of Private Law', pp. 118-139, in Boele-Woelki, K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, European Family Law Series, Antwerp 2003.

[2] MEMO/10/100 of the European Commission, available at http://europa.eu/rapid/press-release_MEMO-10-100_en.htm?locale=en, last accessed 02 May 2016.

[3] Treaty of Lisbon, 1 December 2009; As the Treaty of Amsterdam (entered into force on 1 May 1999) introduced institutional and material modifications, it further amended the status of private international law, extending competences considerably, as will be explored in detail in this thesis. Though, prior to the Amsterdam Treaty, some private international law rules were embedded either within directives, regulations or conventions, such as the Brussels Convention, the considerable shift occurred when competence in the field of judicial cooperation in civil matters was transferred from the third to the first pillar, thereby extending Community competences. The possibility to create new legislation regarding judicial cooperation in civil matters opened up the possibility to adopt legislation in the area of conflict of laws regarding family law and led to Brussels II, the precedent of Brussels II *bis*. With the entry into force of the Treaty of Lisbon, the EC Treaty was replaced by the Treaty on the Functioning of the European Union (TFEU).

[4] Tampere European Council: Presidency Conclusions' (15–16 October 1999), available at www.europarl.eur opa.eu/summits/tam_en.htm., last accessed 02 May 2016.

Brussels II *bis*[5] are applicable; and if so, it must decide whether or not it assumes jurisdiction or whether or not it should enforce or recognise a judgment or order pursuant to the rules of the Regulation. In the context of conflict of laws regarding wrongful removals and retention, the Regulation has, for many disputes, replaced the Hague Convention on Child Abduction[6], which by the time the Regulation was implemented, already had a well-established set of international rules and the related definitions based on a considerable body of case law developed in the courts over a period of over two decades. Furthermore, the Regulation interrelates with the newer Hague Convention on Child Protection.[7] Hence, despite the existence of some particular rules on the interrelation of the Regulation and the Conventions[8], their very co-existence risked giving rise to various conflicting situations and questions of interpretation. For courts familiar with the rules of the Convention on Child Abduction and with their own respective national case law arising under it, the application of the added layer of rules of the Regulation and the interpretation of its different central concepts was and still remains a challenge, as will be demonstrated. For although the Regulation within its own complex body of rules, does contain multiple references to the Conventions, as shall be seen in the thesis, there is limited clear guidance as to their mutual (in)compatibility, which, it is suggested here, created a real risk that the focus on the best interests of the child may all too easily get lost among the issues of procedure. Yet the very aim of the Regulation, as indicated in its own Preamble, is to

[5] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003, L 338/1, in this thesis hereinafter also the "Regulation" and "Brussels II *bis*".

[6] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, hereinafter also the "Convention on Child Abduction".

[7] Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, hereinafter also the "Convention on Child Protection" or the "1996 Convention"; the Convention on Child Protection and the Convention on Child Abduction are hereinafter collectively referred to as "the Conventions".

[8] Brussels II *bis* explicitly refers to the Convention on Child Abduction in recitals 17 and 18, Article 11(1), (2), (3), (6), (8), Article 42(2)(c), Article 60(e) and to the Convention on Child Protection in Article 12(4) and 61, further to both Conventions in Article 59(1), 62(1) and (2).

promote and protect rather than undermine the child's best interests.[9] Hence, this inherent risk, it is argued here, can only have been worth taking if the rules in the Regulation can be shown to be a true advancement in terms of legal clarity and certainty, to promote the best interests of the child(ren) concerned, as is envisaged in the Preamble.[10] However, the situation which has been created is not straightforward and whether or not this has been achieved is the fundamental question which this thesis aims to be address. However, on the surface at least, the additional layer of rules which has been created is not straightforward for courts, difficult to align with the long-established concepts and interpretations and may be procedurally complicated and unclear and thus detrimental to children's best interests in some situations.

For example, if in a case of child abduction, a court denies that the Regulation is applicable as for instance, the habitual residence is determined to be geographically outside the scope of the Regulation, procedures will have be based on the Convention on Child Abduction. Cases may turn out considerably longer and more complex in cases of interaction between the Regulation and the Convention on Child Abduction, the parties have to deal with two layers of rules in two international instruments in one case, potentially increasing the burden on the court, the legal costs and extending the procedural length. . *Mutatis mutandis*, if an order or decision was sought by the parties in a parental responsibility or abduction case under one of the Conventions, the court may decide that the respective Convention is not applicable and that the allocation of jurisdiction, or recognition or enforcement will be subject only to the Regulation, with similar issues of delays, procedural length and uncertainty for the parties concerned. Hence, the rationale for the method and the framework for analysis employed will be set out before setting out the approach of the following chapters which combined will provide critical insight into the fundamental

[9] Brussels II bis, Recital 12 "*The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.".*

[10] Ibid.

question of whether or not the Regulation represents an advancement in terms of enhancing the children's interests as compared with the previous situation.

II. Scope of analysis and methods

In view of the issues raised above, and with the aim of assessing the influence of this situation on the best interests of children affected by these provisions, in terms of procedural fairness and legal clarity and certainty, this thesis will analyse the provisions on jurisdiction, enforcement and recognition in Brussels II *bis* and those in the Conventions on Child Abduction and Child Protection regarding jurisdiction, recognition, enforcement as to their functioning. In so doing, it will compare the structure of comparable rules under the Regulation and the Conventions and will consider the interrelation and complementary structures. A comparison of the Community instrument with the Convention on Child Abduction with regard to the role of the concept of 'habitual residence' and the suitability of the central concepts of the provisions for the particular nature of family disputes shall demonstrate the differences in approach of cases involving Brussels II *bis* and those just involving the Convention. In order to assess the successes and potential failings of the Regulation in its ambition to better promote the best interests of the child it was important to adopt appropriate criteria as a framework for the proposed analysis of the issues at the outset. With regard to the interrelation of the Convention on Child Abduction and the Regulation, the criteria identified for this purpose were selected in order to judge how far the Regulation was able to realise its potential to improve the existing situation under the Convention, despite the additional layer of rules. Both in the context of the Regulation's rules applying on a stand-alone basis in the Member States and in the context of the interrelation with the Conventions, as developed more fully below, the clarity of legislative definitions of key concepts, greater certainty for parties, reduction of delay in proceedings and general procedural fairness, including the opportunity to be heard and an evaluation of the welfare risks for the children concerned, are seen as the main areas where analysis should be undertaken to assess the effectiveness of the Regulation in promoting the child's best interests. Such analysis aims to further reveal the effects of the Regulation on cases involving children from or abducted to non-Member States. The analysis of the differences of the central concepts (habitual

residence, provisional measures, return orders, grave risk, hearing the child) in the Conventions on the one hand and in the Regulation on the other hand aims to reveal the benefits and flaws of the individual rules. It shall further explore whether the rules are encouraging national courts to have sufficient regard to the best interests of the children concerned and how well the Regulation can be seen to promote the best interests of the children concerned as it suggests in the Preamble and throughout the Regulation. Through analysing the case-law of the Court of Justice (hereinafter referred to as the "ECJ"), the body of the Court of Justice of the European Union ("CJEU") which deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals, this thesis wishes to establish the effects of the interpretation of the provisions on intra-Community cases on the Regulation. For the Regulation, the ECJ is clearly the court with determining influence on the interpretation of the rules contained therein. However, there is no court with equivalent jurisdiction in the context of Conventions context, which is potentially problematic. Thus, to provide as good a comparison as possible, it has been decided to undertake an analysis of the case law under the Conventions in English and U.S. courts at, mostly, federal court and superior appeal court level. It is submitted that such decisions will best reveal the accepted interpretation of the central concepts, such as 'habitual residence', under the Conventions and permit a comparison with interpretation of the same concept under the Regulation. The proposed analysis of the Conventions case law will concentrate on the case law of English and U.S. courts since traditionally, those courts have interpreted the Convention on Child Abduction in a frequent, detailed and diligent way and decisions have been considered leading by experts in the field. Because of the common law approach to case law and the meticulous interpretation of statutory and hence similarly Convention or Regulation rules, the thesis will concentrate on such case law considering it the best that is available.

In the context of the Regulation, case law of superior courts of other jurisdictions applying and interpreting the Regulation will only be referred to where relevant and will mainly comprise cases which have influenced or led to decisions of the ECJ.

Thus, the English and U.S. case law shall be the cornerstone of the analysis, both with respect to the Conventions and the Regulation. Decisions in the civil

law jurisdictions of Germany and France are only discussed when leading interpretations on the central concepts and terms were provided in those cases and when the cases were considered “leading” cases in such jurisdictions and had an influence on the interpretation of the central concepts by other courts.[11]

An assessment of definitions provided by the case law and by official reports shall consider the suitability of the provisions of Brussels II *bis* for safeguarding best interest in cases under the Regulation. This is of particular relevance given that their efficiency in protecting the interests of children was stated to be a ‘major concern to the European Union’.[12] Further, the particular difficulties in cases which are be under the umbrella of both the Regulation and one of the Conventions will be discussed. It is suggested that the effectiveness of the rules of jurisdiction, recognition and enforcement in an area concerning the interests of a child or several children subsequent to the divorce or separation of their parents must be judged differently than for rules regarding commercial disputes and that the EU’s intention to promote intra-Community mobility is a double-edged sword. The provisions directly affecting children should work thoroughly in the interests of those children in the first place. The Convention on Child Protection lays emphasis on protective measures, but has only recently been ratified. The effect of this on the interrelation with the Regulation will also be discussed.

An assessment of case-law of the European Court of Human Rights relating to issues regarding the Convention on Child Abduction and the Regulation and the Court as a potential ”instance of review” of Convention cases and even Regulation cases shall further be critically assessed. The question whether the new rules of the Regulation and the interpretations provided by the related case law are promoting a procedural certainty for recognition and enforcement in the best interests of the individual child(ren) is closely related to the question of whether the guidance of the ECJ for the interpretation of the concepts in

[11] For instance, in Germany, cases of importance are identified as such by the courts; cases decided in German higher regional courts and decisions by the French Supreme court.
[12] Communication from the Commission - Towards an EU strategy on the rights of the child, COM/2006/0367 final; Informal meeting of Justice and Home Affairs Ministers, 1-2/10/2007.

Brussels II *bis* have been respected by the national courts. Mutual trust and judicial cooperation[13] have become of dominant significance for the functioning of the enforcement and recognition in context of the application of the Regulation in the national courts and in the interaction of the Regulation and the Conventions.

To establish whether its provisions are in the best interests of the child it is significant to consider that the provisions in Brussels II *bis* have quite regularly during the last few years[14] been a subject of ECJ case law, whilst the English courts and US courts have established a considerable body of case law regarding the main concepts under the Convention on Child Abduction during the last decades.[15]

As judges are confronted with most difficult decisions of applicability and precedence of particular Regulation rules over Convention rules, as well as complementary provisions, it is submitted that it is vital to analyse whether the Regulation's system in regard to abduction cases is more effective than the Convention on Child Abduction's system in attaining its objective of protecting the respective child's interests. In all of the above mentioned decision-making processes and the interpretation of the terms and rules of the Regulation and the Conventions, the concept of 'habitual residence' is of central importance

[13] Judicial cooperation is a common term in the context of the Convention on Child Abduction and the Regulation and in the context of the EU, it refers to cooperation between the Member States, more concrete, between the authorities involved in the application of the Regulation, more details at http://ec.europa.eu/justice/civil/judicial-cooperation/index_en.htm, last accessed 02 May 2016; in the context of the Hague Convention on Abduction, the significance of cooperation has been recognised in the Explanatory Report, and in the Judicial Communications (available at <http://www.hcch.net/index_en.php?act=text.display&tid=21), last accessed 02 May 2016; Prel. Doc. No 6 of August 2002 - Practical Mechanisms for Facilitating Direct International Judicial Communications in the context of the Hague Child Abduction Convention (Preliminary Report + Annexes) and has constantly been a matter of discussion for the Permanent Bureau: "Emerging Guidance regarding the development of the International Hague Network of Judges and a set of General Principles for Judicial Communications within the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", available at <http://www.hcch.net/index_en.php?act=text.display&tid=21>, last accessed 02 May 2016.

[14] since 2006, the European Court of Justice decided 20 cases, and in every year more cases were decided than in the previous year, see < http://curia.europa.eu/juris>.

[15] For statistics see the national Statistics of Convention cases, https://www.hcch.net/de/instruments/conventions/publications1/?dtid=32&cid=24, last accessed 01 May 2016.

and plays a major part in the analysis in the following chapters, not only as a subject itself in Chapter 2 A I 1 but also in the context of the relation of and interaction (Chapter 3) and as a terminus as such. Though the concept of habitual residence has often been criticised for its 'flexibility'[16] in comparison to the 'continuity' of the concept of domicile, the former concept has gained a leading role for the Regulation and it will be seen whether the ECJ has already given considerably reliable guidelines on how to determine it.[17] The following chapters will demonstrate that habitual residence has been a cornerstone of the case-law on the Convention on Child Abduction during the last decades.

The second central subject of analysis will be the practicability of the rule that the Convention on Child Abduction 'continue[s] to apply as complemented by the provisions of this Regulation'[18] and the provisions on recognition, enforcement and return orders will be assessed in the context of Chapters 3 A and 4. It shall be considered whether, in view of the 'best interests of the child', the complementary provisions of Brussels II *bis* have already promoted and are capable of efficiently promoting legal certainty and procedural fairness. An assessment of recent case law as mentioned above will determine whether the ECJ's interpretations of the main concepts respects the interests of those children whose interest is at stake and whether the respective provisions are built solidly enough to promote the harmonised approach throughout the European Union.

By bringing up, for instance, a new interpretation of the concept of habitual residence for the EU Member States, which the Regulation requires to be

[16] McEleavy, P., in Malatesta, A., Bariatti, S., Pocar, F. (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, The Hague 2008, p.291; Shuz, R., *The Hague Child Abduction Convention*, Oxford 2013, p.220, both considering flexibility a factor of uncertainty.
[17] Case C-523/07, *Proceedings brought by A*, [2009] WLR (D) 129.
[18] Recital 17 of the Regulation.

autonomously interpreted[19], despite the long-established case law in cases involving contracting states but also for cases involving non-contracting states under the Convention on Child Abduction,[20] the EU Commission may now be promoting uncertainty. Despite the existence of ECJ rulings which provide guidance as to the determination of habitual residence in the context of Brussels II *bis,* the habitual residence still needs to be determined by the court in each case on the basis of certain factual elements, at its discretion.

The Regulation introduces the concept of hearing the child. The link between the child's right to participate in the proceedings and the 'best interest' approach is obvious.[21] However, it will be considered if this concept has proven successful in the context of the Regulation. The matter of hearing the child is a repeated and dominating concept in the Regulation, in particular pursuant to Articles 11, 23, 41 and 42 of the Regulation and paras 19 and 20 of the Preamble. Additionally, Article 11.2 of Brussels II *bis* states:

[19] It is 'new' since under EU law, a Regulation must be interpreted autonomously, hence by bringing up the Regulation and by building the provisions around the concept of habitual residence, the Commission brought up a new 'version' of habitual residence. As stated in the previous sentence the use of habitual residence in the Regulation has been interpreted by the ECJ. Nonetheless, this interpretation by the ECJ is a guideline rather than a fixed definition and provides the national courts with some discretion; Case C-195/08 PPU, *Inga Rinau*, [2008] ECR I-5271.

[20] See the Australian case of *State Central Authority v Ayob,* [1997] FLC 92-746; 21 Fam LR 567 where the mother had left the United States and returned to Malaysia (a non-contracting State) with the child and then proceeded to Australia. On the American father's application to the Australian Central Authority an order for the return of the child to the U.S was issued; for a definition of habitual residence: United States District Court for Colorado *Application of Robinson,* 983 F.Supp. 1339 (D.Co. 1997) stating that 'settled' requires substantial evidence of the child's connections to the new state of residence, not only the passage of time, this interpretation has been shared by the ECJ in *Proceedings brought by A*, *supra* note 17; see *David S v Zamira S*, 574 N.Y.S. 2nd 429 (1991) and *Re N* (Minors)(Abduction), [1991] 1 FLR 413, [1991] Fam Law 367 on the requirements for being 'settled' as the requirement for habitual residence; for a regularly cited and widely accepted definition: in England: *Re Bates*, CA 122/89. 1, 10, High Court of Justice, United Kingdom (1989); in the U.S.: *Friedrich v Friedrich*, 983 F.2d 1396 at para 1401 (6th Cir. 1993); for criticism: Rogerson, P., 'Habitual residence: the new domicile?' (2000) 49 ICLQ 86, 100-101.

[21] Recital 19 of the Regulation reinforces the importance of hearing the child in the context of the application of the Regulation, and whilst the instrument 'is not intended to modify national procedures', the necessity of hearing the child (under national rules) is made clear; in the Chapter analysing Art.11(2) and the obligation to ensure that the child is given the opportunity to be heard when applying Articles 12 and 13 of the Hague Convention, the debate whether such obligation to hear the child is an advantageous tool will be discussed; for a general overview: McEleavy, P., 'The Impact and Application of the Brussels II *bis* Regulation in the United Kingdom', in Boele-Woelki, K. and González Beilfuss, C. (eds), Brussels II *bis*: Its Impact and Application in the Member States (Intersentia, 2007), pp 316–317.

"When applying Arts 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

With regard to the interrelation of the Regulation on Child Abduction and the Regulation, the case of *Rinau*[22] was a first, but by no means the last, example that the Convention on Child Abduction can no longer be dissociated from the Regulation.[23] As will be demonstrated by an analysis of various cases in the course of this thesis, not only the ECJ but also the English courts recognised the difficulties accompanying the interrelation of the Regulation and the Convention. There is interrelation and, in some situations, even competition, as will be delignated in Chapters 3 A and 4. Despite their very similar objective, Brussels II *bis* and the Conventions differ with regard to the structure of their rules and assessing those rules and the respective case law will hence not only underline distinctions but also highlight the successful and less valuable approaches with regard to the protection of the best interests of children. When considering that Brussels II *bis* refers to the Hague Conventions on Child Abduction and Child Protection in Articles 11, 42, 60 and Articles 12 and 61 respectively and the Regulation "aims to remedy the shortcomings of the Hague Convention"[24], it must be considered if the Convention on Child Abduction really had such shortcomings[25] before the Regulation was introduced.

Interaction of the instruments in disputes involving non-Member States may cause uncertainty and is complex in its application which may be a real disadvantage. On the other hand, a harmonisation of the case law in cases of parental responsibility and child abduction at intra-Community level may have

[22] *Rinau*, *supra* note 19 para.12.
[23] In *Rinau*, ibid, the ECJ gave its first judgment on the interpretation of the Regulation as far as its relationship with the Convention on Child Abduction is concerned.
[24] Commission Working Document, Mutual Recognition of Decisions on Parental Responsibility, March 27, 2001, COM (2001) 166 final.
[25] McEleavy, P., 'The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?' (2005) 1 Int J Priv Law, 5-34.

actively promoted and benefited a fairer process, for children resident in Member States.

A harmonization of the rules on jurisdiction, recognition and enforcement in the field of conflict of laws regarding family law promises to support the further realisation of free movement. Though Brussels II *bis* has been analysed with regard to different aspects[26] it has not been considered whether the provisions in the Regulation have been drafted clearly enough and the concepts defined clearly enough so that they promote the (best) interests of the children concerned, even where the provisions are only complementing the Convention on Child Abduction. This will reveal if the co-existence has further developed the concepts of the Convention on Child Abduction and can diminish inherent flaws so as to enhance the processes of a fair return order and non-return order procedure without interfering with possible hitherto well-functioning concepts of the Conventions.

With regard to jurisdiction, an analysis of the case law on the Conventions, in the Supreme Court and in the Courts of Appeal in England and in the Federal Courts of the United States, the courts in which a considerable number of cases on the Convention on Child Abduction have been decided during the last years, will be undertaken. Additionally selected case-law in civil law jurisdictions will demonstrate the distinctions between the allocation of jurisdiction in the context of the Regulation and Convention. It will be considered whether the approach of Brussels II *bis* is so insular that it may not only be regarded as potentially harmful to international cooperation and in conflict with the internationalist

[26] For instance: McEleavy, P., 'Private international law: Brussels II *bis*: matrimonial matters, parental responsibility, child abduction and mutual recognition' (2004) ICLQ, 53(2), 503-512; McEleavy, P., 'The Brussels II Regulation: How the European Community has moved into Family law' (2002) ICLQ 883-908; McEleavy, P., *supra* note 25 JPIL (30), 5-34; Rauscher, T., 'Parental Responsibility Cases under the new Council Regulation "Brussels IIA'' ' (2005) Eur L F 1, 37-46.

approach[27] of private international law but also a danger to an effective, fair allocation of jurisdiction and enforcement of judgements in the 'best interest of the child'.

Whilst it may have been true that the Brussels II Regulation must have been read in conjunction with the Brussels I Regulation[28] it remains to be assessed whether this is equally true for Brussels II *bis* and what consequences this interpretation has and has had for the case law. Does it create controversy that - as the Borras Report[29], the Explanatory Report on Brussels II stated - identical terms in the Brussels II and Brussels I Regulation must be given the same meaning and have courts in their interpretation of the Brussels II concepts referred to the case law on Brussels I instead of referring to well established case-law regarding the Convention?

Even the European legislator seems to have now recognised the need to address the difficulties caused by the instruments' interrelation.[30]

With respect to enforcement, the question whether Brussels II *bis* has strengthened the Convention on Child Abduction in cases of enforcement is worth critical consideration since the national courts' practice on allowing a child to be taken abroad permanently and the enforcement of return orders differed

[27] *Re E* [1999] 2 FLR 642; *Re J* [2004] EWCA Civ. 417, [2004] 2 FLR 85; the Hague Conventions are the result of the states' awareness for international cooperation and the view that international treaties are a better instrument to achieve certain objectives than national rules; the Regulation replaces those rules for the Member States and creates a new system applicable to situations in Member States and in some situations even beyond the borders of the EU.

[28] Stone, P., 'The developing EC private international law on family matters', (2001) 4 CYELS 373, in Dashwood, A., Hillion, C., Spencer, J., Ward, A., *The Cambridge Yearbook of European Legal Studies: 2001*, Oxford, 2002; Caracciolo di Torella, E., Masselot, A., 'Under construction: EU Family Law', EL Rev. 2004, 29(1), 32-51, 44.

[29] *Borras Report*, Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Prof. Alegria Borras (1998) OJ C 221/27.

[30] Practice Guide for the application of the new Brussels II Regulation (EU Commission, October 2005) at http://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ii_en.pdf, last accessed 02 May 2016.

noticeably during the last decades.[31] Based on a different interpretation and application of habitual residence and on a different procedural approach to recognition and enforcement, some countries have a history of reluctance to return an abducted child, whilst others have an advanced way of handling it and respecting the Convention on Child Abduction.[32] This thesis will analyse, from a perspective not taken before, whether the flaws of the concepts of enforcement and recognition under the Convention on Child Abduction have been addressed in the Regulation so as to inhibit delays and unfair results caused by non-enforcement of orders. After the Hague Convention on Child Abduction had been dealing with the issue of enforcement for over thirty years, Brussels II introduced an additional basis for return orders. It is hence worth critically considering the case-law of the ECJ and the European Court of Human Rights (ECtHR) with regard to return orders made under the Convention on Child Abduction and under Brussels II *bis*. Conflicts with the Regulation and future co-existence shall be discussed with regard to the Convention on Child Protection.

In the context of the provisions on applicable law the thesis will discuss the provisions in the Regulation referring to the Conventions, hence the rules on applicability of the Conventions for the determination of the applicable law. Hence, it will be analysed whether the proper functioning of the Regulation is impaired as it regulates jurisdiction, recognition and enforcement yet not the applicable law. Therefore, in the context of establishing the interrelations and interactions created by the co-existence of the European beside the international instruments a further question an answer will have to found for is whether legal uncertainty is caused by the fact that applicable law is not dealt with by the Regulation.

In furtherance to the discussion of the existing framework, the thesis will discuss the need for possible amendments of Brussels II *bis*, and will discuss whether a review of the jurisdictional or recognition and enforcement concepts will be

[31] Schulz, A., 'The enforcement of child return orders in Europe: where do we go from here?', (2012) IFL 43, 46-47.
[32] As laid down in *Re T* (Abduction: Rights of Custody) [2008] EWHC 809 (Fam), [2008] 2 FLR 1794.

required. It will finally conclude from its analysis whether the promotion of intra-Community mobility has been gained at the expense of supporting the best interests of the children concerned or if the Regulation supports an efficient allocation of jurisdiction but establishes a enforcement and recognition process at the detriment of the child(ren) concerned in the because of its interrelation with the Convention on Child Abduction. In this context it will also critically assess the European Parliament's call on the Commission to submit a proposal for the amendment of Brussels II *bis* and the reactions to this request.[33] It must be considered a primary concern to determine whether the Regulation promotes the search for the best forum or the most favourable law rather than protecting the interests of children by fairly allocating the competent court and enabling swift return in the situation of divorce and separation or even abduction.

III. Approach to the task

Chapter 1: The second part of this Chapter considers the legislative process regarding the Regulation during the last years, from the Treaty of Amsterdam to the extension of Union competence and the development from Brussels II to Brussels II *bis*. It refers to the Regulation's relation with the Hague Conventions in view of the aims of the Hague Conference, as well as the development of the cornerstone concepts in U.S., UK and continental case law. Further, it portrays the integration into conflicts of laws in UK family law and the position of Brussels II *bis* in the framework of international family law. In Chapter I D, the meaning of the term 'best interest(s)' in the context of the Convention on Child Abduction, the Convention on Child Protection and the Brussels II *bis* Regulation, hence in the context of custody, parental responsibility and abduction cases, is analysed.

Chapter 2 analyses the provisions in the Regulation, first on jurisdiction, in view of the main concepts established by the ECJ during almost one decade with an

[33] Report announced to be published on http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_en.htm., last accessed 02 May 2016.

emphasis on the connecting factor 'habitual residence' and the suitability of those central concepts of the provisions for parental responsibility and custody cases. Such analysis reveals the benefits and shortcomings of the individual rules and reveals whether the rules encourage national courts to have regard to the ‘best interests’ of the child concerned as is suggested in the Preamble and throughout the Regulation. It examines consistency with general legal doctrines developed under the Convention on Child Abduction as incorporated in the Regulation or taken up by the ECJ and national courts. It critically analyses whether by bringing up a ‘new’ approach to the interpretation of habitual residence the Regulation is really promoting legal certainty. It will be determined if the guidance provided by the numerous ECJ decisions strengthens the Regulation by introducing continuity and certainty of definitions or whether the Regulation weakens the functioning of the Convention and inhibits its application.

Chapter 2 also addresses the particularities of jurisdiction under Brussels II *bis* in child abduction cases. In the second part of the Chapter, the Regulation's and the ECJ's concepts regarding provisional measures in the context of Brussels II *bis* are examined and with regard to complex situations where children are resident in third states and/or where it is difficult to determine the place of habitual residence of the child.

The second part, Chapter 2 B, also assesses the ECJ case-law in the context of return orders, and the rules on divorce in view of their impact on parental responsibility cases and discusses an extension of application of the Regulation to cases involving non-Member States and the interrelation in cases involving Member States and Contracting States, prorogation and derogation, in the context in which the ‘best interests’ are relevant, or even referred to explicitly.

Chapter 3 compares Brussels II *bis* with the two Hague instruments, the rules directly addressing the interrelation and beyond this scope, the rules which are relevant for the interrelation. It demonstrates that the Conventions can no longer be dissociated from the interpretation of the Regulation and examines the consequences the ECJ’s decisions have on the interrelation with and proper functioning of the Conventions, thereby showing whether the legislative efforts of the EU and the judgments of the ECJ take the right direction to meet the

ambitious aim of respecting the best interests of the child. Such aim of respecting the 'best interests' of the child is explicitly incorporated in the rules of the Regulation but only indirectly in the Convention on Child Abduction. Hundreds of cases have been decided on the Convention on Child Abduction during the last decades and, as explained, the analysis of the case law will be restricted to English and US courts, the courts in which a considerable number of leading cases on the Convention on Child Abduction have been decided during the last years and to some leading decisions in continental courts. The chapter addresses difficulties in the Convention on Child Abduction which the Regulation tries to overcome, in the interest of fast and fair proceedings.

The chapter assesses the structure of jurisdiction, enforcement and recognition under the Convention on Child Abduction and establishes the effects of the rules for children in Member States and non-Member States, Contracting States, in the interrelation with the Regulation. The chapter further assesses the concept of hearing the child in the Regulation and the Conventions. Besides this interaction, the impact on cases which are initiated in non-Member States but 'drawn' into the ambit of the Regulation shall be analysed. Whilst the ECJ's judgment in *Sundelind Lopez*[34] has approached the issue of whether Brussels II *bis* applied to divorce proceedings where the respondent was a third country national, resident and domiciled outside the EU, this will have to be analysed in the context of child abduction cases. Furthermore, with regard to parental responsibility, the territorial scope in parental responsibility disputes involving a child habitually resident in a third country will be assessed.

Chapter 3 finally assesses the interrelation with the Convention on Child Protection.

Chapter 4 critically discusses the concepts of enforcement and recognition in the Regulation in interrelation with the Convention on Child Abduction. The provisions are analysed both as interpreted by the ECJ and in official reports and as applied in the national case law so as to review their procedural

[34] Case C-68/07, *Sundelind Lopez,* [2008] 1 FLR 582.

suitability and the protection of the individual child's best interest in cases under Regulation and the Convention. It hence assesses the complementary or prevailing nature of the respective provisions in the Regulation. Further, the chapter analyses the ECtHR's suggestion that it has the function of a reviewing court and considers the involvement of the ECtHR in the interpretation of Brussels II *bis* and the Convention on Child Abduction, and considers how return orders were particularly prone to involvement by the ECtHR and how the influence of the ECtHR has an impact on national case-law and the interpretation of the Regulation. It delineates the lack of mutual trust of the national courts in the cases underlying the ECJ case law and its significant impact on a proper functioning of the Regulation in the 'best interests' context. It further analyses the power of the Regulation and its mechanism of overriding the Convention in the interaction of Articles 11 of the Regulation and 13 of the Convention of Child Abduction.

In the first part of ***Chapter 5*** with regard to the provisions on applicable law it is examined how the provisions on applicable law in the Convention on Child Abduction and in the Convention on Child Protection work for the Regulation and how the fact that the Regulation does not contain any rules on the determination of the applicable law influences the interrelation. Hence, Chapter 5 deals with a further issue of interrelation in addition to what is discussed in Chapters 3 and 4.

As the Convention on Child Protection also contains rules on applicable law, it is determined how this third instrument adds to the interrelation. It is assessed how choosing the "right" applicable law is influential on protecting the 'best interest(s)'.

Chapter 5 further addresses areas of concern with regard to which structural amendments to the Regulation are necessary, as specific possibilities for improvement will then have become clear from the preceding analyses. It reveals the cornerstones of concern with regard to the Regulation. In this context the Public Consultation of the EC Commission and the results of the Study undertaken by Beaumont, Walker and Holliday as a research project founded by the Nuffield Foundation are analysed.

In ***Chapter 6***, based on the considerations in the previous chapters, it will have become clearer if Brussels II *bis* has strengthened a fair allocation of jurisdiction and if its recognition and enforcement provisions have promoted proceedings in the best interests of the children concerned and has brought about a true advancement. Chapter 6 will answer the research question. It draws a conclusion if the Regulation, to the extent it complements and replaces the Convention on Child Abduction, has abolished existing difficulties. It will have been established if there are well-functioning jurisdiction, recognition and enforcement processes but the interrelation creates difficulties to the detriment of the interests of the child(ren) concerned. Or if there is, in general, an improvement. It will be suggested which concepts have proven successful and which amendments are required to prevent a run for the best forum or the most favourable court to order provisional measures or to prevent the enforcement of (return) orders. It is finally suggested if an improved compatibility of the Conventions and the Regulation or a completely distinct structure of the rules of the Regulation with no intervention in the respective other system's rules would be helpful to warrant an efficient procedure and swift proceedings with legal certainty.

B. Brussels II *bis* – the background

Analysing Brussels II *bis* with regard to its alleged objective of safeguarding the best interests of the child(ren) concerned requires a consideration of the background of the Regulation and of the concepts adopted from other Regulations. Considering that Brussels II *bis* refers to the Hague Convention on Child Abduction and the Convention on Child Protection in Articles 11, 42, 60 and Articles 12 and 61 respectively it seems reasonable to establish how and why the Regulation and the revised version were introduced. Where persons and families move within the EU[35], establishing jurisdiction rules in the field of

[35] There is a close link between the movement of persons and cross-border divorce and parental responsibility disputes that it is reflected in the Statistics referred to herein. Most importantly the ECJ departed from the workers concept by holding that, if EU citizens were not allowed to lead a normal family life in the host Member State, this would constitute a hindrance

family law may support the further realization of free movement and contribute to the diminution not only of trade but also of legal borders.[36]

The development of EU competences, starting from the Treaty of Amsterdam in 1997 and culminating with the Treaty of Lisbon ten years later has allowed the Union to create legislation directly in the field of judicial cooperation in civil matters, with a cross-border implication.[37] Under the umbrella of Article 65 of the Treaty of the European Union[38], the EU has, with Brussels II *bis*, proceeded with rules on parental responsibility proceedings, a process of harmonisation which it had initiated it by Brussels II. During the last decade several moves moves have been made with respect to the harmonisation of the private international law in the area of family law and in contrast to Brussels II *bis*, Regulations EC 1259/2010 and 4/2009 include provisions on appiicable law.[39]

To understand the analysis of the provisions, a short look into the legislative background of the current version of the Regulation proves valuable. Brussels II, the precedent of Brussels II *bis*, has had an immense impact not only on

to the exercise of the freedoms granted by the Treaty, since citizens would be discouraged from exercising their rights of entry into and residence in this Member State**-** Case C-127/08, *Metock v Minister for Justice, Equality and Law Reform*, [2004] ECR I-10719.

[36] Change to the concept of free movement of persons within the EU has occurred in different ways, one being the combined reading of provisions on EU citizenship and on anti-discrimination by the ECJ – most recently in *Metock*, where the Court stated that securing the possibility to lead a "normal family life" was irreplaceable to enable and protect the free movement of EU citizens. Social and welfare rights have been developed constantly, also with regard to third-country nationals, primarily by the case law of the ECJ (most recently in Case C-291/05*, Metock and Minister voor Vreemdelingenzaken en Integratie* v *Eind* [2004] *ECR* I-10719 and *Förster* (Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep*, and *Baumbast, Baumbast* and Case C-413/99, *R v Secretary of State for the Home Department* [2002] *ECR I-07091*) and might further develop as a result of Directive 2003/109/EC however the restrictions Member States may still refer to must not be disregarded („genuine link" and „certain degree of integration").

[37] Crifo, C., 'Civil Procedure in the European Order: An Overview of the Latest Developments' in Dwyer, D. (ed.), *The Civil Procedure Rules Ten Years On*, Oxford 2009.

[38] Treaty establishing the European Community (Nice consolidated version) - Part Three: Community policies - Title IV: Visas, asylum, immigration and other policies related to free movement of persons - Article 65, OJ C 325.

[39] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

private international law but also family law by giving all EU Member States except Denmark[40] the same basis for jurisdiction for divorce, separation and annulment proceedings, and to an extent parental responsibility. Under the revised Regulation rules for proceedings regarding parental responsibility and abduction were added.[41] As the Treaty of Amsterdam introduced institutional and material modifications, it further amended the status of private international law, extending competences considerably. Though, prior to the Amsterdam Treaty, private international law rules were already embedded for instance in the Brussels Convention[42], the considerable shift occurred when competence in the field of judicial cooperation in civil matters was transferred from the third to the first pillar[43], thereby extending the Community competence to legislation in the field of private international law.

As a result of the reorganisation of the responsibility of judicial cooperation in civil matters in the pillars, the European Commission's initiative in private international law related to family law has then increased rapidly.[44] It is not for this thesis to consider the practical effects of the process of harmonisation directly grounded upon Article 81 TFEU. It is sufficient to mention at this point that the minutes of the Tampere meeting of the European Council in 1999[45] set out specific plans for civil, including family, law and with regard to family law, a number of those measures have been put in place. This was possible because of the changes in the law making structure and procedures for the adoption of

[40] Brussels II *bis* does not apply to Denmark.
[41] Scope of the Regulation as per Article 1.
[42] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.
[43] The Pillars of the European Union: The Treaty of Maastricht (1992) introduced a new institutional structure which remained until the entry into force of the Treaty of Lisbon. This institutional structure was composed of three "pillars": The Treaty of Amsterdam transferred some of the fields covered by the third pillar to the first pillar (free movement of persons): http://europa.eu/legislation_summaries/glossary/eu_pillars_en.htm, last accessed 02 May 2016.
[44] *supra* note 39; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
[45] Tampere Council Meeting, Minutes Part II, Item 10(b), OJ C54 of 25 Feb 2000.

legislation introduced by the Amsterdam and then the Lisbon Treaty.[46] Brussels II was the start of a decade of the implementation of European legal instruments in the area of private international law regarding family law.[47] Pursuant to the Lisbon Treaty, in most areas of EU legislation, decisions can be taken by qualified majority voting, however, in the family law field legislative proposals are subject to unanimity voting so that a Member State can exercise their national veto. The amendments suggested by the European Parliament have no binding force and national Ministers of Justice reserve the decision making power. Any change to EU family law needs to be approved by every national Parliament. Judicial co-operation in civil matters remains subject to qualified majority voting in Council and a shared power for decision making power with the Parliament and under such treaty umbrella, the Commission Work Programmes are evidence for the rapid development in legislation in the area of conflict of laws.[48]

The shift from the third to the first pillar and hence the removal of the necessity for a link between a legislative instrument and the internal market was the legal basis for the Union competence on the adoption of measures in the field of conflicts of law rules regarding family law.[49] As discussed, 'judicial cooperation' became a cornerstone element for such new legislation - it initiated a complex body of rules with considerable influence on national jurisdictions and courts and transferred considerable legislative power from the States to the EU, thereby aiming at a contribution to further integration.[50] In England, the first

[46] The Lisbon Treaty initiated change in the EU's law-making structures- bringing about changes in with respect to how EU legislation is proposed and adopted. Civil justice and conflict of laws family law provisions are in the chapter on 'freedom, security and justice'. Few changes were made to these sections which was mainly Art 65 of the Treaty establishing the European Community. In the Lisbon Treaty, Art 65 on 'judicial co-operation in civil matters' refers to the scope of action – 'matters having cross-border implications'.

[47] ibid.

[48] All Commission Work Programmes available at http://ec.europa.eu/atwork/key-documents/index_en.htm, last accessed 02 May 2016.

[49] Fallon, M., 'Constraints of Internal Market Law on Family Law', in Meeusen, J., Petergás, M., Straetmans, G., Swennen, F., (eds.), *International Family Law for the European Union*, Antwerp/Oxford, 2007, pp.149-181.

[50] Tichy, L., 'A new role for private international law' in Brownswood, R., Micklitz, H.-W., Niglia, L. and Weatherill, S. (eds.), *The Foundations or European Private Law*, Oxford 2011, p.401, 412.

version of the Regulation, Brussels II, with respect to certain provisions, effected no profound change in the law since the harmonized jurisdictional bases were to a certain extent reflective of the grounds for jurisdiction in matrimonial causes, and the Family Law Act 1986 already provided for an almost-automatic recognition of most foreign matrimonial decrees. English courts seized in divorce proceedings already had accessory jurisdiction with regard to related child proceedings, and child custody orders from other Member States were already granted recognition under the Luxembourg Convention.[51]

However, it became clear that there were very profound indirect consequences. Regulation 1347/2000 was the first EU instrument dealing exclusively and directly with family law from a private international law perspective, based on the 'Brussels II Convention' of 1998[52] (which never came into force).

Brussels II was subject to massive criticism.[53] Criticized for its unfair treatment of non-marital children, the Regulation came to an end when the Commission Proposal in a slightly adapted form was adopted as Brussels II *bis*[54], to also refer to parental responsibility disputes arising outside of the context of

[51] Luxemburg Convention, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, Luxemburg, 20.V.1980 The solicitors' representative association (Resolution) estimated in its Comments on the EU Green Paper on Applicable Law and Jurisdiction in Divorce Matters (Rome III) available at http://www.resolution.org.uk/site_content_files/files/resolution_response_to_green_paper_on_divorce_law_2.pdf>, last accessed on 30 April 2016; that over half of the international family cases dealt with in England and Wales concerned third countries, in particular the United States and Commonwealth.

[52] On 28 May 1998, the Member States signed the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (known as the "Brussels II Convention") and the Protocol on its interpretation by the Court of Justice (Official Journal C 221 of 16.07.1998). Explanatory reports on the Convention and the Protocol were approved on the same day. The Convention has not been ratified by the Member States.

[53] Lowe, N., 'Negotiating the Revised Brussels II Regulation' (2004) IFL, 205-217.

[54] Ibid.

matrimonial proceedings and child abduction situations including the immediate recognition of access and return orders without *exequatur*.[55]

By 2006 the originally small Brussels II *bis* plan had developed into a foundation for further harmonisation of family law in the context of private international law, providing the foundation for further influence in this area based on the 'Tampere Conclusions'[56]. Though the EU's legislative influence in the area of private international law appeared to become more moderate in general since 2006, as several approaches such as the amendment of Brussels I was put on hold,[57] it may not be argued that the EU's interest in the area of family law was diminishing. Rather, the recent Regulation on choice of jurisdiction in divorce matters[58] and Commission and Council communications demonstrate the EU's ambitions to take further influence on the area and 'Rome III'[59] demonstrates that the EU has no fear to deal with applicable law in the context of 'enhanced

[55] http://ec.europa.eu/civiljustice/glossary/glossary_en.htm, last accessed 02 May 2016, Exequatur is a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad. Abolition of the exequatur procedure between Member States for all judgments in civil and commercial matters is the ultimate objective of the mutual recognition programme adopted by the Commission and the Council in December 2000.

[56] Conclusions 33 and 34 of the European Council Meeting at Tampere, 15 and 16 Oct 1999, available at http://www.europa.eu.int/comm/justice_home/doc_centre/civil/recognition/doc_civil_recognition_general_en.htm, last accessed on 30 April 2016.

[57] A long reform process by the EU Commission starting in 2007 finally led to Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Regulation (recast)).

[58] Council Regulation, *supra* note 39 (OJ n. L 343, p. 10 ff.).

[59] The proposal for "Rome III" died the legislative death; it was a Commission proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters of 17 July 2006 (so-called 'Rome III' Regulation). In June 2008, the Council recorded that there was no unanimity to proceed with the proposed Regulation. Wells-Greco, M., 'Evolving EU Private International Law: an Overview of the Commission's Proposal on the Law Applicable to Divorce and Legal Separation' (2010) IFL November, 333-335; The European Commission released its proposal on 24 March 2010 (COM (2010) 0105) for a Regulation laying down choice of law rules in divorce and legal separation matters. The positive opinion of the European Economic and Social Committee was submitted shortly thereafter on 14 July 2010 (SOC/379); At the end of 2010, the Union then adopted Regulation EC No 1259/2010 on the law applicable to divorce and legal separation.

cooperation'. Furthermore, the Commission has confirmed its commitment to a further abolition of *exequatur* in the area[60].

The process of harmonisation particularily pursued during the past fifteen years has been accompanied by approaches to a further harmonisation in the area of family law. Those arguing in favour of harmonization argue that it will be a continuation of the process initiated by Brussels II and that this development further demonstrates the symbolic significance of the adoption of Regulation 1347/2000.[61] Those arguing against the harmonization say that the first impression of the lawyer or researcher considering or dealing with the impact of the new 'European' family law structure on third state or formally 'Hague' cases is that it is problematic and creates a labyrinth.[62]

With regard to conflict of laws rules, the process of harmonisation was generally welcomed, however, it has been commented quite often that any further steps than the now existing would need to be considered carefully.[63]

Whilst the harmonisation was welcomed within the EU, the other perspective is the perspective of non-Member States. In addition, disputes are often not restricted to the EU and to intra-Community settings. Though aware of the difficulties related to Article 4, para 2 of Brussels I, the European legislator omitted to integrate into Brussels II *bis* a provision as a solution for such 'third state' situations in Brussels II and then again in Brussels II *bis*. With respect to

[60] In June 2011 the European Council adopted a Resolution entitled "Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings", (OJ C 187, June 2011, 28th). Brussels II bis is a Title IV instrument.
[61] Boele-Woelki, K., 'The European Agenda: an Overview of the Current Situation in the Field of Private International Law and Substantive Law' (2006) IFL 149, 154; Dethloff, N., 'Arguments for the Unification and Harmonisation of Family Law in Europe', in Boele-Woelki, K. (ed), *supra* note 1, pp. 51-53, referring to Brussels II.
[62] Meeusen, J., 'System Shopping in European Private International Law in Family Matters', in: *International Family Law for the European Union* (eds. Meeusen, Johan et al.), Antwerpen/Oxford, 2007, p. 239-278, p. 270; Baker, H., 'The Court of Justice and Brussels II Revised, (2006) IFL, November, Feature; Karsten, I., 'The State of International Family Law Issues: A View from London' (2009) IFL, March 2009, Features; McGlynn, C., *Families and the European Union: Law, Politics and Pluralism*, Law in Context Series Cambridge 2006, p.152; common law jurisdictions, which are used to applying the lex fori in family law matters and accustomed to the use of judicial discretion to control forum shopping, England and Ireland have had to make much greater adjustments to accommodate the EU family law.
[63] ibid p.412.

Article 4 of Brussels I, an extensive discussion had developed on the application of the Regulation to situations involving third states, i.e. non-Member States. According to one view, the provision refers to the national rules, thereby embedding them into the structure of the Regulation[64] and domestic rules may solely be applied if the Regulation provides for an authorization. According to the other view, the Regulation only regulates jurisdiction between the Member States in so far as the judicial area of the EC is concerned and the national rules remain applicable to the extent the judicial area is not concerned. The discussion moved in various directions, including the well-known *Owusu*[65] case and the question whether the extension of the personal scope of the jurisdiction rules to defendants domiciled in non-Member States might be possible and 'to what extent the special jurisdiction rules of the Regulation, with the current connecting factors, could be applied to third State defendants.'[66] Being aware of this problem, the European legislator could, over the years when Brussels II and Brussels II *bis* were implemented, have sought a solution so as to clarify the situation with respect to non-member states cases regarding in family disputes. The ECJ's reasoning in *Owusu* seems consistent with the Preamble of Brussels I: *"There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by the Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States"*. Article 4 was not amended by Regulation 1215/12 (Brussels I *bis*) and at least the problem of domiciliaries of non-Member States remains. This discussion is vital, since, to the same extent as in Brussels I, the scope of Brussels II *bis* is unclear with respect to an application of the Regulation to cases regarding non-Member States, in particular Contracting states under Conventions, except as explicitly regulated in the Regulation. Depending on the outcome of the determination of the

[64] Briggs, A., *The Conflict of Laws*, Oxford 2nd edition 2008, p.91; McClean, D., *Morris: The Conflict of Laws,* London 5th edition 2000, p.123.
[65] Case C-281/02 - *Andrew Owusu v N. B. Jackson*, trading as "Villa Holidays Bal-Inn Villas" and Others.
[66] Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 21.4.20 09, COM(2009) 175 final, p.8 et seq., at http://eurlex. europa.eu/LexUriServ/LexUriServ.do?uri= COM:2009:0175:FIN:EN:PDF, last accessed on 02 May 2016.

habitual residence of the child, the Regulation may hence be applicable or not be applicable. Third country relationships are of particular significance for the United Kingdom because of its Commonwealth background but also for the continental systems since there are growing numbers of private relationships going beyond the EU's borders. Mc Glynn regarded some provisions in Brussels II bis *"likely to provoke adverse reaction"* in third countries and as McEleavy points out, this would allow a parent of a New York resident child to rely on his French nationality to obtain a French court order which would then be enforceable in all Member States.[67]

As this analysis moves on, it will be considered in more detail whether the European harmonisation impedes the consensus with third countries and whether there are indications that future family law measures might have to be based on wider consultation having respect to third country interests[68] as enhanced cooperation is one of the primary aims of the Commission. A preliminary aim is the cooperation between the courts of the Member States[69] and the Joint Conference of the European Commission and the Hague Conference on Access to Foreign Law in Civil and Commercial Matters[70] was a

[67] McEleavy, P. 'Brussels II *bis*: The Communitarisation of Family Law Continues' (2004) IJFL (2), 14-16, 14; for a background of the harmonisation process at the beginning see Boele-Woelki, K. (ed.), *supra* note 1; for criticism on a harmonised European family law: McGlynn, C., *supra* note 62.

[68] Commission (EU), 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions--Justice, Freedom and Security in Europe since 2005: An Evaluation of the Hague Programme and Action Plan' SEC (2009) 766 final (10 June 2009) 103; Council (EU), 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens' 17024/09 (2 December 2009) 25.

[69] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters [See amending act(s)].

[70] Joint Conference of the European Commission and the Hague Conference on Access to Foreign Law in Civil and Commercial Matters, Brussels, 15 to 17 February 2012, information available at http://www.hcch.net/index_en.php?act=events.details&year=2012&varevent=248, last accessed on 02 May 2016.

starting point for necessary cooperation between the organisations which have developed the Regulation on the one hand and the Convention on the other.[71]

There is a gap in clarity as to whether the Regulation applies beyond the borders of the EU. The interpretation of the rules of Brussels II *bis* in disputes regarding non-Member and 'Hague'[72] States is furthermore significant as, from the US perspective, the European approach is to an extent inconsistent with the due process inherent to US law and the Regulation is considered an intrusion in US cases rather than a benefit.[73] According to Silberman, cases are drawn into the EU.[74] As will be discussed in detail in Chapter 3, the problem of the Regulation in matters somehow related to non-Member States which are Contracting States is not restricted to those provisions directly referring an interaction of the legislative instruments Convention on the one side and Regulation on the other. It is far more complicated and extends to various situations.

Furthermore, as explained further above, the jurisdiction rules in Brussels II *bis* and their application in disputes related to non-Member State are inextricably linked to the judicial controversy and scholarly discussion on two central views related to Brussels I - one holds that the Regulation refers to the national rules, thereby embedding them into the structure of the Regulation, and domestic rules may solely be applied if the Regulation provides for an authorization. The other view holds that the Regulation only regulates jurisdiction between the Member States in so far as the judicial area of the EC is concerned and that the

[71] Report on a conference organised jointly by the European Commission and the Hague Conference on Private International Law in February 2012 to discuss access to foreign law in civil and commercial matters, very general statements were made, available at http://www.hcch.net/upload/foreignlaw_concl_e.pdf, last accessed on 01 May 2016.
[72] Hague cases are cases being dealt with under one of the Conventions.
[73] Silberman, L., 'Recent US and European decisions on the 1980 Hague Convention on Child Abduction: a perspective from the USA in tribute to William Duncan' (2012) IFL March, 53-55.
[74] ibid.

national rules remain applicable to the extent the judicial area is not concerned.[75]

As the considerations on Brussels I[76] indicate, the provisions particularly related to non-Member States play a significant role within the conflict of laws Regulations. With regard to Brussels II *bis*, the central problem with regard to non-Member States is the interrelation of the Regulation with the Conventions and the application of the Regulation once a parental responsibility case or abduction case also relates to a Contracting State or once the rules are complemented by the Convention of Child Abduction.

It is of utmost significance for parties and courts to know whether they will be dealing 'just' with a 'Hague' case or a case solely under the Regulation, or if both apply. Legal certainty for EU domiciliaries and parties from Contracting States cannot be disregarded if the interests of one child or more children are at stake. There are several situations where the Regulation expands its scope beyond the European borders, which will be discussed in the following chapters.A further issue is the background of guidance on the interpretation of the provisions of the Regulation. While it may have been true that the Brussels II Regulation must have been read in conjunction with the Brussels I Regulation[77] it remains to be seen whether this is equally true for Brussels II *bis* and it will be seen how valuable the separate set of rules is.[78] The Borras Report, the Explanatory Report on Brussels II,[79] stated that identical terms in the Brussels II Convention and Brussels I must be given the same meaning, with the ECJ case-law having to be taken into account. What does this mean for the case-law regarding Brussels II *bis,* in particular in cases of child abduction?

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[75] Briggs, A., *supra* note 64, p. 91; Collins, L., *Dicey, Morris, and Collins on the conflict of laws*, London 15th ed 2006, Volume 1, Part 3 , Chapter 12, 12-013 to 12-023.
[76] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), 14 December 2010, COM (2010) 748 final.
[77] As was suggested by Stone, P., *supra* note 28; Caracciolo di Torella, E., Masselot, A., *Under construction: EU Family Law)* (2004, E L Rev, 29(1), 32-51, 44.
[78] The Jenard Report on the Convention of 27 September 1968 (on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1979) OJ C 59 1) had pointed out the difficulties of including family matters in the Brussels Convention.
[79] Borras Report, *supra* note 29, para 6.

English judges and scholars have been particularly aware of the difficulties inherent in dealing with and interpreting the rules regarding Brussels II *bis* and the Convention on Child Abduction and Child Protection.[80] Annual reports and statistics identify difficulties of interpretation and implementation, reveal gaps and support the argument that international judicial cooperation is significant to enhance the efficiency of dealing with such cases.[81] Without doubt, the Regulation has an laudable objective set forth in the preamble[82] – the following chapters will analyse whether the achievement of this objective is a price too high as, possibly, children either from Member States or from Contracting States[83] are disadvantaged by the provisions or that litigants from Member States are faced with disadvantages in the international context. Statistically, an increase in cross-border cases falling under the scope of Brussels II *bis* can be observed in the Member States, as well as a general increase in cases under the Regulation and the Conventions.[84]

Whilst as a Title IV instrument, Brussels II *bis* solely applies to cases 'having cross-border implications', Article 66 of Brussels II *bis* provides that individual

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[80] "the participation of English family lawyers and judges in international matters has increased significantly, and their reputation has noticeably shifted from being rather insular to being involved, highly capable and willing to make a contribution to improving the lives of families unfortunate enough to be involved in a dispute with an international dimension" Nichols, M., 'Keeping pace with international family law: a view from the trenches' (2013) IFL July, Features July; notably, the number of cases decided in English courts on questions involving Convention and Regulation cases considered 'leading' by the Hague Conference on Private International Law has also increased. In 1999, the Permanent Bureau of the Hague Conference on Private International Law established The International Child Abduction Database (INCADAT), with a database of decisions in the Contracting States to the Convention and Brussels II *bis* decisions.

[81] Statistics for Germany available at <http://www.bundesjustizamt.de/cln_349/EN/Topics/citizen__services/HKUE/Statistics/statistics__2011,templateId=raw,property=publicationFile.pdf/statistics_2011.pdf>, for Ireland at <http://www.justice.ie/en/JELR/Pages/Increase%20in%20the%20number%20of%20applications%20dealt%20with%20by%20the%20Central%20Authority%20for%20Child%20Abduction>, for England, there are no statistics, but a useful report: <http://www.ejtn.net/PageFiles/6333/Annual_Report_England_Wales2011.pdf>; last accessed on 01 May 2016. In France there are no statistics, neither The Ministry of Justice nor the National Institute for Demographic Studies (INED) collect case statistics, there are no such statistics in Sweden, Spain.

[82] Preamble refers to the objective to "serve the protection of the children's best interest "

[83] The Hague Conference regularly discusses improvements and difficulties of the Conventions; Duncun shows that the Hague Conference also considers the case-law under the Regulation: Duncan, W., 'Future Developments in International Family Law with Special Emphasis on Cross-border Child Protection: A View from The Hague', March (2010) IFL, 24.

[84] *supra* note 81.

territorial units within a multi-jurisdictional Member State shall be treated as Member States for the situations set forth therein. There have also been EU attempts to encourage mediation with regard to marriage breakdown and resulting parental responsibility proceedings.[85] In some jurisdictions, EU harmonization has encouraged forum shopping in divorce matters, thereby diverting divorce and parental responsibility proceedings to different jurisdictions.[86] As de Boer mentions the lack of clarity resulting from the many undefined terms in Brussels II has been criticized by British and continental lawyers alike.[87] Replacing Regulation 1347/2000 with Regulation 2201/2003 offered a chance to remove many problems known to be existing under the former, however many drafting errors were made. For instance, the error in Article 8(2) of Regulation 1347/2000 is repeated in Article 7(2) of Regulation 2201/2003.[88] As de Boer noted, Regulation 1347/2000 was unclear regarding the construction of 'nationality' in cases of dual nationality and regarding the meaning of 'acceptance' of jurisdiction.[89] Whilst a different formulation is being applied in respect of the latter in Regulation 2201/2003[90] no changes were made with regard to other drafting flaws. For instance, there is uncertainty produced by unclear wording with respect to the procedures preceding a second hearing by the court of origin in child abduction cases Article 11(6)-(8).[91] Besides all criticism related to the Regulation, it should however not be disregarded that the rules of child law in England had been extensively condemned for their complexity[92] so that Brussels II and Brussels II *bis* were assumed to provide a chance for less problematic procedures than under the preceding regime. McEleavy argues that the flawed drafting of Brussels II and

[85] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, [2008] OJ L136/3.
[86] Carruther, J., 'Party autonomy in the legal regulation of adult relationships: what place for party choice in private international law?' (2012) ICLQ 61(4), 881-913; Cuadernos de Derecho Transnacional, October 2011, Vol. 3, Nº 2, pp.85-129.
[87] de Boer, T., 'Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation' (2002) 49 Netherlands Intl L Rev. 307, 343-344.
[88] Grammatical errors: ''in'' and ''either''
[89] de Boer, *supra* note 87, at 344.
[90] Article 12(1)(b) of the Regulation.
[91] McEleavy, *supra* note 25 at 30-31.
[92] Lowe, N. 'The Family Law Act 1986--A Critique' (2002) Fam Law, at 39-60.

Brussels II *bis* may be considered the result of rushed negotiations, misunderstood complex legal concepts, compromises resulting from unrelated, and politically more important, matters[93] whilst de Boer argues that there was an institutional unwillingness to consider academic legal literature before drafting the Regulation.[94]

After more than 10 years after the introduction of the Regulation, this thesis analyses whether some of the criticism is obsolete and which new grounds for criticism have developed. Hence, it seems this is an unfortunate situation, considering that lawyers and judges are left in the dark as to whether there will be efforts of the EU Commission regarding amendments of the Regulation.[95]

In view of all the matters identified within this Chapter, the following Chapters will analyse if the situation with respect to Brussels II *bis* and the Conventions is still as problematic as some have assumed during the last years.[96]

Before embarking on this, however, it is important to consider the critical term "in the best interests of the child", both within the parallel pieces on international legislation and for the purpose of the thesis.

C. "Best interests" of the child

A possible definition of the term "best interests of the child" can be approached in different ways, from a cultural, sociological and legal perspective.[97] However,

[93] McEleavy, P. 'First Steps in the Communitarisation of Family Law: Too Much Haste, Too Little Reflection?' in Boele-Woelki, K. (ed), *supra* note 1, 522-523.
[94] de Boer, *supra* note 87, at 344.
[95] Tichy, L., *supra* note 50, p.401.
[96] Lowe, N., *supra* note 52, Lowe argues that the moment "will surely come when the proliferation of international instruments will simply become counter-productive because of the ensuing complexity"; McEleavy, P., 'Luxembourg, Brussels and now the Hague: congestion in the promotion of free movement in parental responsibility' (2010) ICLQ, 59(2), 505-519; McEleavy argues that "The 1996 Hague Convention has undoubtedly suffered from the vagaries of European politics during its short life, but it is at last to derive some benefit from the communitarization of private international law as it is able to enter into force simultaneously for eighteen of the nineteen outstanding Member States not already States Party".

as this thesis concentrates on the analysis of the interaction of the Regulation and the two Conventions, it is fair to limit the presentation of the interpretations of best interest to an overview in the legal context. Over the last decades family courts across the world have developed a similar approach on how the best interests of the child (or best interest as used in singular in US courts and continental courts) should be determined, but with differing results in the national jurisdictions.[98] As there is no definition of the term in, for instance, English statutes, Parker argued that 'best interest' standards are regarded as indeterminate and the influence of the principle depends on the context in which it is applied and varies from one jurisdiction to another.[99] However, the term has become an integral part of the international declarations and conventions concerning the protection of children.[100] In the context of this analysis, the focus shall lie on the meaning and application of the term in the context of the Convention on Child Abduction, the Convention on Child Protection and Brussels II *bis*, hence in the context of parental responsibility and abduction cases.

In the Preamble of the Convention on Child Abduction, it is stated that

"the interests of children are of paramount importance in matters relating to their custody",[101]

[97] Alston, P., ed., *The Best Interests of the Child*, Oxford 1994.
[98] Fortin, J., *Children's Rights and the Developing Law*, Cambridge, 2009, p.23; Lehmann, J., Children Australia, Volume 33, Issue 01, January 2008, pp. 2-3.
[99] Parker, J., 'The best interests of the child – Principles and Problems' (1994) Int J Law Policy Family 8 (1), 26-41.
[100] The U.N. Declaration of the Rights of the Child comprises a Preamble and ten principles. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354. For an online text of the Declaration, see the Office of the U.N. High Commissioner for Human Rights (UNHCHR) Web site, http://www.unhchr.ch/html/menu3/b/25.htm; Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49; the Convention on Child Protection; the Convention on Child Abduction.
[101] Hague Convention on Child Abduction, *supra* note 6, preamble.

In the Convention on Child Protection, the Preamble states that "the best interests of the child are to be a primary consideration"[102] and the Preamble of Brussels II *bis* is even clearer:

"The grounds of jurisdiction in matters of parental responsibility established in the present version of the Regulation are a constant reference to the best interests of the child, in particular based on the criterion of proximity. This means that jurisdiction should be in the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility."[103]

With regard to such an agreement, Article 12(3) of the Regulation requires that

"(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the ***best interests*** *of the child."* [emphasis added]

And Article 15 of the Regulation with reference to a court which is "better placed to hear the case" restricts the transfer to cases where the transfer as such is in the best interests of the child. Finally, Article 23 of the Regulation refers to a possible non-recognition in cases of parental responsibility

"(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child"

According to Article 1 of the Convention on Child Abduction, the objective of the Convention on Child Abduction is

"*to secure the prompt return of children wrongfully removed to or retained in any Contracting State*"

and to secure

[102] Hague Convention on Child Protection, *supra* note 7, preamble.
[103] Regulation, *supra* note 5, recital 12 of the preamble.

"*that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States*."

In the Explanatory Report to the 1980 Hague Convention, it is mentioned that during the drafting of the Convention it was decided not to include the wording 'best interests of the child' because of the experience that this concept entailed that judges of a state to which the child had been removed would rule on the custody of the child.[104]

Paragraphs 23 and 24 of the Preamble of the Regulation reflect the drafters' intention to combat the increase in international child abductions *and* to protect the children concerned. In theory, the concept of the best interest of the child therefore means the immediate return of the child to his/her State of habitual residence as the right with priority over the interests of the parents. In June 2011, the Special Commission on the practical operation of the 1980 and 1996 Conventions considered *Neulinger*[105] and *Raban*[106], two cases in the ECtHR which will also be significant in the following analysis. Those cases have drawn the Convention on Child Abduction into the ambit of the European Court of Human Rights and raised many questions of interpretation of the Regulation but also the question whether the national courts in such cases also have to consider the European Convention of Human Rights and even the Convention on the Rights of the Child and whether the ECtHR's requirements on assessments to be undertaken by the national courts can in any way be binding or be of relevance for the interpretation of the Convention on Child Abduction or even the Regulation.

Though, as Professor Pérez-Vera noted, the principle of the best interests of the child is not explicitly part of the Convention on Child Abduction and the wording of the objectives of the Convention and the Preamble circumvent a clear

[104] Explanatory Report on Recognition and Enforcement of Judgments in Matrimonial the 1980 Hague Child Abduction Convention, Offprint from the Acts and Documents of the Fourteenth Session (1980), volume III, Child abduction, The Hague 1982.
[105] *Neulinger and Shuruk v Switzerland*, Application No 41615/0708 January 2009.
[106] *Raban v Romania*, Application No 25437/08, 26 October 2010.

reference so as to avoid that courts would resort to the concept to avoid returning a child to a –in their assessment 'wrong' country.[107] This suggests she considers a firm, explicit concept disadvantageous as it would enable courts to resort to denying a return to the state of the habitual residence (as the ultimate concept of the Convention which shall only be denied if very exceptional circumstances apply). Pérez argues that the absence of a direct reference should not lead to the conclusion that the Convention

"ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them".[108]

Rather, she argues, the preamble declaration that the contracting state

"firmly convinced that the interests of children are of paramount importance in matters relating to their custody"[109]

demonstrates how serious this paradigm is taken. Whilst Pérez-Vera underlines this as an advantage, the lack of an explicit reference bears the disadvantage that those applying the Convention must not consider the "best interests" a paramount standard but must consider that the "interests of children" are of "paramount importance"[110].

The term relates to the concept in the Convention on the Rights of Children, and despite limited historical references to this idea in the late 19th and early 20th century, it is a primarily contemporary legal concept.[111] The concept of "the best interests of the child" was firmly introduced into an international legal instrument

[107] *supra* note 104, 21-23.
[108] ibid.
[109] ibid.
[110] Preamble of the Convention on Child Abduction.
[111] Eekelaar, J., 'The Emergence of Children's Rights' Oxford Journal of Legal Studies 6.2 (1986) Oxford Journal of Legal Studies 6.2, 161–182; Archard, D., and Skivenes, M., 'Deciding Best Interests: General Principles and the Cases of Norway and the UK.' (2010) Journal of Children's Services 5.4, 43–54.

in the 1959 Declaration of the Rights of the Child.[112] Principle 2 of the Declaration states,

"[t]he child shall enjoy special protection, in the enactment of laws for this purpose the best interests of the child shall be the paramount consideration."

Both the Regulation and the Conventions display the European legislators' view that uniform rules determining which country's authorities are competent to take the necessary measures are decisive for the direction a cross border family law case takes and how the competent court should be determined to safeguard the interests of the child or the children concerned. The cooperative, internationalist approach that a legislative instrument regulating conflict of laws rules beyond the borders is the underlying principle. The "best interest" is not just a term used in the Regulation and in Conventions, it is a principle underlying the whole concept of protecting a child's interests in cross-border decisions on jurisdiction, recognition or enforcement set forth in the rules of the Regulation.[113] As will be explored in this thesis, it is a principle of utmost importance in family law cases dealing with conflict of laws issues, not least because the determination of the competent courts and the recognition and enforcement can significantly influence the direction a case takes. Whilst the concept also is also an integral part of national family law in most jurisdictions, the protection of the child's interests tends to be even more difficult in cross-border cases, where many other factors are involved. What is most important for this analysis is that the Regulation in its preamble and the Practice Guide[114] claims the Regulation's rules are in the best interest, so that a 'correct' interpretation of those rules would generally –though not ultimately- safeguard the best interests of the child. Making such a claim despite the fact that there was an international instrument covering jurisdiction, recognition, enforcement and applicable law in the context of child abductions, is not a humbled approach. It is an approach with the underlying firm trust in that a European law instrument is more appropriate than

[112] *supra* note 100.
[113] As will be established in the analysis in Chapters 2, 3 and 4..
[114] Practice Guide for the application of the Regulation (2005), *supra* note 30.

an international instrument. In the Convention on Child Protection, explicit references to the best interest can be found in multiple rules.[115] In the Lagarde Report on the Convention on Child Protection it is explained with regard to Article 8 that as an exception to jurisdiction in the state of the habitual residence, the article provides the possibility for the authority which normally has jurisdiction to transfer jurisdiction to the courts of another Contracting State if it considers the transfer would be to a court 'better placed in the particular case to assess the best interests of the child'.[116] Nonetheless the Report refers to the drastic example of both parents being killed in an accident. In such a situation the child would return to the State of nationality where the other members of his or her family reside.[117] The Commission rejected proposals which would have authorised transfer to the authority of a non-Contracting State if such were in the best interests of the child.[118] As such, there is no possibility to transfer jurisdiction to a non-Contracting state under Article 8 of the Convention on Child Protection. As the Convention entered into force in the Member States of the European Union, there can be no situation that the transfer can be denied to a Member State for the reason of being a non-Contracting state. Articles 8 and 9 incorporate into the Convention a revocable system of *forum non conveniens* and *forum conveniens,* with the reason that the child's best interests are better protected or ensured by authorities in a state other than the state of the habitual residence. The Chapter on applicable law in the Convention on Child Protection has a similar approach to the best interest; in Article 15(2), there is no reference to proximity but to the best interests.

With regard to Article 15 the Report points out that the Commission rejected proposals which would have obligated the authority exercising jurisdiction to respect certain substantive rules laid down in the Convention on the Rights of the Child, such as the consent of the child in respect of measures concerning

[115] Article 8(1), 8(4), 9(1), 10(1), 22, 23(2), 28, 33(2) and the Preamble of the Convention on Child Protection.
[116] Explanatory Report on the 1996 Hague Child Protection Convention, Paul Lagarde, 1998, Description, Offprint from the Proceedings of the Eighteenth Session (1996), tome II, Protection of children, p.559.
[117] *supra* note 116, p.559.
[118] ibid.

him or her, or the taking into account of the social background of the child as well as the ethnic, cultural and religious origins of his or her parents.[119] In Chapters 3 and 5 hereof the concept established in Chapter 3 of the of the Convention will be examined in more detail in the context of the interaction of the Convention and the Regulation and in the context of applicable law.

Neither the drafters of the Regulation nor of the Conventions decided to refer to the best interests of the child principle used in Article 3 of the Convention on the Rights of the Child.

As noted by Professor van Bueren,

"...a lack of certainty or indeterminacy is inherent in the best interests principle. Indeed such a lack of certainty, which some may regard as flexibility and as a virtue, is essential in the case-by-case approach, which the best interest standard requires."[120]

From being based on a psychological approach[121], the "best interests" standard has developed into a more complex concept regularly referred to in the Convention on Child Protection and the Brussels II *bis* Regulation as well as the case law on the Brussels II *bis* Regulation and the Convention on Child Abduction.[122] As the case law on the Convention on Child Protection is still in its infancy it is all the more important to establish the interrelation with the Regulation and to fully understand its influence on the use and interpretation of the concept of the best interest. In his foreword to the 1996 Convention Practice

[119] *supra* note 116, p.575.
[120] Van Bueren, G., *Child Rights in Europe, Council of Europe (Strasbourg)*, 2007, statement.
[121] Between 1973 and 1986, Goldstein, Freud, and Solnit published three influential, controversial books on the best interests of the child. During the 70s and 80s, children in child welfare proceedings were increasingly represented by lawyers or guardians whose advocacy included a consideration of their interests: Spinak, J., 'When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate' (2007) Family Law Quarterly, Vol. 41, 393.
[122] Paton, J., 'The correct approach to the examination of the best interests of the child in abduction convention proceedings following the decision of the Supreme Court in *Re E* (Children) (Abduction: Custody Appeal)' (2012) J Priv Int L, 8(3), 547-576.

Guide, published by the Ministry of Justice in February 2013, Lord Justice Thorpe, the Head of International Family Justice for England and Wales, notes:

"…the Convention has been widely recognised by all experts in the field as a highly significant international instrument."

and

"The Convention became available to our court in November 2012. Now that we have the Convention it is vital that specialists in the field of international law should be familiar with the Convention and should rapidly develop expertise in its use."[123]

Despite the fact that it might be a loosely defined term from jurisdiction to jurisdiction, the context of the Conventions and the Regulation in which it is closely linked to the concept of habitual residence – both in the case-law of the Regulation and the Conventions and in the wording of the Regulation and the Convention on Child Protection – seems to have made a considerably more concrete and 'tangible' concept. At the same time, it will become evident in the following assessment how the use of the concept has been fragmented by the interaction and interrelation of the legal instruments and by the discretion of the national courts in interpretation of the wording of the norms referring to the concept in those instruments. In turn, the rules in the international and in the European instrument can be perfectly drafted in some parts and in the interest of the children but nonetheless to the detriment of children because of the lack of clarity in other parts and/or because of the relationship and interaction between the Regulation on the one hand and the Conventions on the other hand. What is the merit of a continuous reference to the principle of the 'best interest' if the interaction of the Regulation and the Conventions make conflict of laws issues so complicated and abstract that the courts dealing with it are

[123] The 1996 Hague Convention Practice Guide, available at http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/international-child-abduction-and-contact-unit/1996-hague-convention-guide.pdf; last accessed 01 May 2016.

caught in making decisions on how the Regulation is applicable and if one of the Conventions also has to be dealt with. In the course of the following assessment it will be explored how the concept of best interest is linked to habitual residence as the connecting factor of great influence, to the jurisdiction laws in general, to the concepts of declining jurisdiction and conflicting proceedings and to provisional and protective measures, so as to assess if the EU's move into the international family law has brought a true advancement. It will be explored if the advancement the legislator claims it has brought in the interest of the children involved in the respective cases has really taken place.[124]

As Lord Kerr stated in *ZH (Tanzania) v SSHD*:

"*it is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them*." [125]

As this thesis moves on, it will be discussed if and how the principles incorporated in and concepts applied in the context of the Regulation and primarily the Convention on Child Abduction have worked to ensure that the interests of the child are a primary consideration.

[124] Preamble of the Regulation; Practice Guide for the application of the Regulation (2005), *supra* note.
[125] *ZH (Tanzania) v SSHD* [2011] UKSC 4 at para. 46.

D. Concluding remarks

This Chapter has set the framework of analysis and the aims of the further research. It has provided an overview of the background of the existing framework of the Regulation and the Conventions and to the cornerstone term “best interests of the child” before the substantive analysis regarding the provisions in Brussels II *bis* can begin. It has indicated the origins of Brussels II *bis*, and has given some attention to the upcoming questions arising from the existing framework of the Conventions and the Regulation. The different questions culminating in the research question of whether an advancement may have been achieved have been explained. In the following chapter, the concept and particularities of the provisions on jurisdiction, recognition and enforcement in Brussels II *bis* will be considered, and whenever it is deemed necessary a referral to and comparison with the rules in the Conventions will be undertaken to clarify how the Regulation deviates from the existing concepts. This is the first cornerstone which will then lead to the issues of the interrelation, which will be approached as this thesis moves on in the following chapters.

Chapter 2 Family Disputes – The framework of the Regulation and the Conventions

A. Jurisdiction, enforcement and recognition in Brussels II *bis*

I. The following will analyse the provisions in the Regulation, first on jurisdiction, in view of the main concepts established by the ECJ during the last decade, with a focus on the connecting factor 'habitual residence' and will assess the suitability of those central concepts for parental responsibility and custody proceedings. It will consider benefits and shortcomings of the individual rules and assess whether the rules encourage national courts to have regard to the 'best interests' of the child concerned as is suggested in the Preamble and throughout the Regulation. It will further assess distinctions between the central concepts with general legal doctrines developed under the Convention on Child Abduction as incorporated in the Regulation or taken up by the ECJ and national courts. It will further address whether the Regulation is promoting legal certainty by bringing up a new approach with respect to the concept of 'habitual residence' and through the guidance on interpretation provided by the numerous ECJ decisions so as to determine if one strength of the rules is that it added to continuity and certainty.Jurisdiction in Brussels II *bis*

In the following, the concept of jurisdiction in Brussels II *bis* will be analysed to provide an insight to the most relevant provisions in the context of parental responsibility and child abduction. Issues on jurisdiction are at the heart of many disputes and the specific nature of the provisions seem to draw many cases into the ambit of the Regulation, as will be assessed.[126]

[126] Kruger, T., Samyn, L., 'Brussels II bis: successes and suggested improvements', JPIL, Vol 12, 2016 - Issue 1, 132-168.

1. 'habitual residence' – introduction

In *Marinos v Marinos*[127], not long after the Regulation had entered into force the English High Court assumed the concept of habitual residence in Brussels II *bis* very close to the common law concept of domicile and whilst this may be true for the common law concept of domicile, there is not much similarity of the concept under Brussels II *bis* to general concept of domicile. *Marinos v Marinos* were proceedings under Brussels II *bis* concerning the question whether the wife was habitually resident in the UK and could therefore issue a petition for divorce in the English courts. The judgment considered the significant question how the Regulation's concept of habitual residence had to be interpreted and if a difference under the Regulation of the terms "habitual residence" and "reside" should be assumed.

Brussels II *bis* requires the courts in the Member States to take the Regulation as a basis for any consideration regarding parental responsibility, custody and abduction cases – the courts are obliged to consider the rules of jurisdiction in order to ascertain whether or not jurisdiction can or, depending on the applicable Article, must be assumed. If the court may not assume jurisdiction, it is obliged to consider whether the courts in any other Member State have jurisdiction. Should the court deny this, the national rules would apply. The key connecting factor is habitual residence.[128]

Though there is no definition of habitual residence in the Regulation or the Practice Guide[129], the Preamble of the Regulation refers to a "real link" between the party concerned and the Member State exercising jurisdiction and a close examination of the ECJ case-law established during the last years gives an

[127] *Marinos v Marinos* [2007] EWHC 2047 (Fam); 2 FLR 1018.

[128] Articles 3, 5, 7 8, 9, 10, 11, 13 and 14 of the Regulation.

[129] Practice Guide for the application of the Brussels IIa Regulation (EU Commission, 2014), available at http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf, last accessed on 30 April 2016, Section 3.2.3.1: "Habitual residence is not defined by the Regulation. The meaning of the term should be interpreted in accordance with the objectives and purposes of the Regulation. It must be emphasised that the interpretation of habitual residence is not determined by reference to any concept of habitual residence under any particular national law, but should be accorded an "autonomous" meaning under and for the purposes of the law of the European Union. Whether or not in any particular case a child has her or his habitual residence in any particular Member State has to be determined by the court in each case on the basis of the facts applying to the situation of that particular child."

indication of the minimum requirements necessary for habitual residence[130] of the child to be assumed. But it also reveals the difficulties entailed by the missing definition on the one hand and the chances such an omission may offer judges in cases relating to non-Member States on the other hand. As the following will explain, habitual residence is one of the cornerstone terms in the Regulation, closely linked in various sections with the qualifier 'if it is in the best interests'.

2. Structure and concept of the jurisdiction provisions

As regards its content, the Regulation is inspired particularly by the Hague Convention on Child Protection.[131] Article 8(1) of the Regulation, - like Article 5(1) of the Convention on Child Protection -, confers jurisdiction on the courts of the State of the habitual residence (résidence habituelle) of the child, thereby establishing a general rule for jurisdiction.[132]

The general scheme for a court seised with a request concerning parental responsibility based on Brussels II *bis* is to establish, first, whether it has jurisdiction pursuant to the general rule, Article 8, and if this is not the case, whether it has jurisdiction pursuant to Articles 9, 10, 12 or 13. Should none of those rules confer jurisdiction to the court, the question will be whether a court of another Member State has jurisdiction in accordance with Article 17, and if no court is competent under the Regulation, the national court may exercise any jurisdiction available under the national law, Article 14.

Brussels II *bis* has caused considerable discussion for attaching great significance to the availability of a forum for separating couples and parents seeking custody or access rights but not containing a set of "central" provisions on jurisdiction as can be found in Brussels I. Rather, it offers a rather complex

[130] *Proceedings brought by A*, *supra* note 17, was the first case in the ECJ to clarify the meaning of the term habitual residence in the Regulation; the second case; Case C-497/10 PPU *Mercredi v Chaffe* was a request by the Court of Appeal to clarify the appropriate test for determining the habitual residence of a child for the purpose of Article 8 of the Regulation and Article 10 of the Regulation.

[131] Practice Guide (2005) supra note 30, para XI.

[132] Opinion of Advocate General Kokott delivered on 29 January 2009 on *Proceedings brought by A*, *supra* note 17.

set of rules on jurisdiction regarding rights of access and custody, -parental responsibility- and a less complex one on divorce, legal separation and marriage annulment.[133]

Given the pioneer nature of some rules[134] and the ambitious aims of the legislator[135] that the Regulation shall act in the best interest of the child, it will be seen how this is effected by the courts. In the following a more detailed insight to the concept and structure of the rules regarding jurisdiction will be provided.

3. The general rule with regard to children and parental responsibility

Generally, of the seven alternative bases for jurisdiction provided by the Regulation, Article 8 is the provision which most reflects the general principle that the most appropriate forum with regard to questions of parental responsibility is the Member State of the habitual residence of the child. The concept extends to the provisions on matrimonial matters. Hence, in the context of matrimonial matters, according to Article 6, a spouse who is habitually resident in the territory of an EU Member State may solely be sued in the courts of a different Member State if one of the provisions on jurisdiction contained in Articles 3-5 of the Regulation applies.

A change of habitual residence of the child while proceedings are pending does not result in a change of jurisdiction. However, the transfer of a case is possible in the circumstances stated in Article 15.

Proceedings regarding A[136] raised some important questions regarding the interpretation of the Regulation. First it raised the question of how the concept

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[133] de Boer, *supra* note 87; Caracciolo di Torella, E. and Masselot, A., 'Under Construction: EU Family Law' (2004) E.L. Rev., 29(1) 32-51, 44; Rauscher, T., *supra* note 26, p. 37.
[134] Pioneer insofar as the Convention rules are replaced and concepts related thereto are no longer the basis for the considerations of the judge; The "Report on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000" demonstrates how much the Regulation has changed but also how many uncertainties remain.
[135] Conclusions 33 and 34 of the European Council Meeting at Tampere, 15 and 16 Oct 1999, available at http://www.europa.eu.int/comm/justice_home/doc_centre/civil/recognition/doc_civil_recognition_general_en.htm, last accessed 02 May 2016.
[136] *Proceedings brought by A*, *supra* note 17.

of habitual residence in Article 8(1) of the Regulation, and the associated Article 13 of the Convention on Child Abduction, are to be interpreted under Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State. Second, the question was whether a case, after the taking of the protective measure, has to be transferred of the court's own motion to the court of the Member State with jurisdiction. In *Proceedings brought by A*[137], a reference to the ECJ by a Finnish court, a case in which children C, D and E were taken into immediate care and placed in a foster-family, the Court held, that due to the absence of a definition in Article 8(1) of the Regulation of the concept of 'habitual residence', must be considered in the light of the context and the objective of the Regulation, above all the best interests of the child.[138]

In contrast to McEleavy's assumption that the ECJ might refer to the 'connecting factor' or to residence for a certain period of time[139] the Court held that its case-law relating to the concept of habitual residence in other areas of European Union law may not be directly transposed to the context of Article 8 of the Regulation but that the habitual residence must be established by considering all circumstances of the respective individual case.[140] Emphasising that physical presence is insufficient, the Court underlined that the residence of the child must reflect some degree of integration in a social and family environment. The other significant question regarded the conditions for adopting a protective measure such as the taking into care of children under Article 20(1) of the Regulation and the question whether such a measure may be applied pursuant to the rules of national law and, additionally, whether the case must be transferred to the court of another Member State having jurisdiction after such a

[137] ibid.
[138] ibid, para 44; the term must be „interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. [...] in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child".
[139] McEleavy, P. (2004), *supra* note 26, 503-512.
[140] *supra* note 132, paras 37 et seq.

measure has been taken. The questions to the Court showed a full set of complex issues relating to the interpretation of the Regulation, all of which will be touched upon again in the separate chapters on the respective aspects. For instance with regard to provisional and protective measures in urgent cases, the Court held that measures may be taken by a national court under Article 20 if such measures are indeed urgent and provisional.[141] This interpretation will be analysed in Chapter 2 B I-II on provisional measures.

According to the Advocate General, the interpretation of habitual residence proposed by the Court in this case should be assumed to be equally applicable for the other types of jurisdiction directly or indirectly connected in Articles 9, 10 and 13,[142] not least because Article 5(1) of the Convention on Child Protection, like Article 8(1) of the regulation, confers jurisdiction in the first place on the courts of the State of the habitual residence of the child and the Convention particularly acted as a role-model for those rules.[143]

4. A reflection on the strength of habitual residence compared to domicile

The concept of habitual residence is inherent first of all in the general rule on jurisdiction but also throughout the Regulation. Though the concept of habitual residence has been used very differently in a very flexible way and the ECJ, in the short time Brussels II (*bis*) exists, has not been hesitant to establish a new concept for the definition and dispense with the interpretations developed by the steady flow of case-law of the Contracting States to the Convention on Child Abduction.[144] Because of the guideline for the application of the concept provided by the ECJ in *Proceedings brought by A*[145] and *Mercredi v Chaffe*[146],

[141] s*upra* note 132, paras 46 et seq.
[142] s*upra* note 17132, para 19.
[143] Siehr, K., 'The 1996 Hague Convention on the Protection of Children and its application in the EU and the world' (2012) IFL 77; Pirrung J., 'Improvements to international child protection as a result of the 1996 Hague Child Protection Convention', (2012) IFL 70 at 72.
[144] The term has been interpreted very flexible approach in the UK (*Re F* (A Minor) (Child Abduction) [1992] 1 FLR 548; *Re R* (Abduction: Habitual Residence) [2003] EWHC 1968 (Fam), [2004] 1 FLR 216; *Cameron v Cameron* [1996] SC 17. Cf *Re P-J* (Children) (Abduction: Habitual Residence: Consent) [2009] EWCA Civ 588, [2009] 2 FLR 1051.).
[145] *Proceedings brought by A, supra* note 17.
[146] *Mercredi v Chaffe, supra* note 130.

national courts now have to find a way to respect the key requirements defined therein. The requirements set forth by the European Court of Justice that habitual residence is

"the place which reflects some degree of integration by the child in a social and family environment"[147]

depend on numerous factors.[148] Though it is true that the domicile is generally easier to determine[149], the concept of habitual residence is an integral part of the Convention on Child Abduction.[150] Furthermore, to an extent, flexibility, which remains possible, may be significant in abduction cases, to allow a court to reflect on a particular situation, with particular circumstances.[151] The broader meaning and interpretation of habitual residence as compared to the strict legal concept of domicile enables the court dealing with a cross-border abduction case or parental responsibility case to consider circumstances, not simply facts.[152] As the analysis moves on, it will be seen whether habitual residence is not only more suitable than domicile in the context of family law cases but also whether the key aspects mentioned by the ECJ are sufficiently clear to give the national courts a guideline for the determination of a habitual residence which is in the child's interest. With the general rule on jurisdiction referring to the habitual residence of the child as the connecting factor, the Regulation has taken up a concept well established in conflict of laws regarding family law[153] but given it a new, independent interpretation, with consequences for every provision and concept in the Regulation which mentions the term. In *A v A* the Supreme Court noted that there had been debate as to whether the concept of

[147] *Proceedings brought by A, supra* note 17, para 44.
[148] *Proceedings brought by A, supra* note 17.
[149] Domicile defines the legal relationship between the individual and that legal system which is invoked as his personal law: Mackay, J., *Halsbury's Laws of England, Conflict of laws* (Volume 19 (2011)), 2. Domicile and Residence, (1) Nature of Domicile, 336.; A person is domiciled in that country in which he either has or is deemed by law to have his permanent home.
[150] *supra* note 20.
[151] Beaumont, P., McEleavy, P., *The Hague Convention on International Child Abduction*, Oxford 1999, p.90.
[152] Pursuant to the judgement *in the Matter of KL* (A Child) [2013] UKSC 75, "there is no legal rule, akin to that in the law of domicile, that a child automatically takes the habitual residence of his parents".
[153] Mackay, J., *supra* note 149, (3) Residence 360. Habitual residence.

habitual residence in the case law of the courts of England and Wales for the purposes of the Convention on Child Abduction and under English law differed from the interpretation of the Court of Justice with respect to the Regulation.[154] The Court held that the concept of the Court of Justice should be favoured.

Furthermore, the Court brought up the valuable argument that the courts in England and Wales had applied a separate concept based on the concept of "ordinary residence". It further noted that the concept in *R v Barnet London Borough Council, ex p Shah*[155] was not suitable for determining the residence of a child applicable to a child, placing too much emphasis on the intentions of the parents.[156]

It further referred to the temptation of the courts to assume that a child's habitual residence was that of those holding parental responsibility

"there is no legal rule akin to that whereby a child automatically takes the domicile of his parents."[157]

"[T]he test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child."[158]

5. Exceptions to the general rule

Articles 9, 10, 12 and 13 define the requirements for the courts of a Member State in which the child is not habitually resident to have jurisdiction.

Article 9 provides that where a child lawfully relocates from one Member State to another and acquires a habitual residence in the respective new state, the courts of the former State of habitual residence shall retain jurisdiction for a

[154] *A v A and another* (Children: Habitual Residence) [2013] UKSC 60 [2013] 3 WLR 761.
[155] *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309.
[156] *A v A and another, supra* note 154, Lord Hughes noted that emphasis should not as such be on the parents' intentions.
[157] ibid.
[158] ibid.

period of three months following the move. This operates to preserve the opportunity for those who become unable to exercise access rights in the same manner as before the move to apply for an appropriate adjustment of access rights before the court that granted them such rights. Consequently, the courts of the Member State where the child stays subsequent to the move do not have jurisdiction in matters of access rights during the three month period immediately after arrival of the child. However, Article 9 is subject to several conditions, namely that the courts of the Member State of origin must have issued a decision on access rights, that it applies only to 'lawful'[159] moves and only during the three-month period following the move, that the child must have acquired habitual residence in the new Member State during this period and that the person holding access rights must still have habitual residence in the Member State of origin. Hence, this rule refers to non-abduction situations, where a parental responsibility right has led to a move of the child.

Apart from the fact that those restrictions seem relatively strong and require a combination of circumstances, it seems a reasonable necessity that the child must have acquired habitual residence in the new Member State.[160] It must be noted that the courts of the new Member States may decide on matters other than access rights and that under the Regulation access orders might take advantage of the new 'fast track' recognition regime.[161] To consider the rule "an innovative rule which encourages holders of parental responsibility to agree upon the necessary adjustments of access rights before the move"[162] is very optimistic, as will be seen in the course of the analysis on the recognition of orders.

As for the remaining grounds of jurisdiction, reference will concisely be made to jurisdiction based on presence, Article 13 and to residual jurisdiction, Article 14. Most rules on jurisdiction reflect the legislator's favourable ambition that the

[159] As compared to wrongful removal and retention.
[160] As habitual residence is the connecting factor jurisdiction of the courts of the new Member States without the acquiring of habitual residence would have been in discrepancy with the aims of the Regulation set forth in the Preamble.
[161] Article 41 of the Regulation.
[162] *Practice Guide, supra note* 30, section II 2.a.

criterion of proximity always has priority and that jurisdiction should always be in the Member State of the child's habitual residence, except for few exceptional situations.[163] But Article 14 is much more complex than it suggests at first sight. The provision may lead to the unfortunate situation that decisions in matters relating to parental responsibility taken on potentially exorbitant bases of jurisdiction take advantage of the Regulation's provisions regarding recognition and enforcement. Why is that? The predominance of Article 8 hardly allows for any exceptions. National rules of jurisdiction are almost never applicable. But pursuant to Articles 7 and 14 the national rules are still relevant when no court of a Member State has jurisdiction when the connecting factor leads to jurisdiction outside the Member States. Hence, in the framework of the rules on jurisdiction, Article 14 is less authoritative than the other provisions.

Closing Chapter II, Section 2 of the Regulation, Article 15 has a uniqueness compared to other Community private international law instruments. It allows for a transfer of jurisdiction to the courts of another Member State in exceptional circumstances. Article 15(3) sets out five circumstances in which a “particular connection” to another Member State will be established, namely, where that Member State has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or is the former habitual residence of the child; or (c) is the place of the child's nationality; or is the habitual residence of a holder of parental responsibility; or is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property. The Article is based on the functioning and the advantages of cooperation between the courts to make certain that even in exceptional cases jurisdiction is allocated in the court which most suitably placed to deal with the case, having regard to the best interest of the child. Hence, a court which would otherwise have jurisdiction in accordance with Article 8 may request the courts of another Member State to

[163] Recitals (12) of the Regulation.

assume jurisdiction if the courts in that Member State are "better placed to hear the case".[164]

It remains to be seen how the ECJ will deal with nationality as a connecting factor, as mentioned by Article 15(3)(c) of the Regulation. This aspect will be considered in more detail when discussing the relation of the Regulation and the Convention on Child Protection.

6. The particularity of jurisdiction in child abduction cases

Whilst the Convention on Child Abduction solely provides legal remedies to interrupt the period of undisturbed presence and to hinder the acquisition of a habitual residence in the state to which the child was abducted, in Brussels II *bis*, jurisdiction in child abduction cases is governed by a special rule, Article 10, which builds on the concept of Article 7 of the Convention on Child Protection[165]. Hence, under the Regulation, generally the courts of the Member State in which the child was habitually resident before the abduction remain competent to decide on the substance of the case also after the abduction.[166] Jurisdiction may be attributed to the courts of the Member State to which the child was abducted under strict conditions.[167] With regard to jurisdiction in abduction cases, the Regulation is based on the seemingly simple approach that it applies whenever a child is habitually resident in a Member State where a child has been abducted to or from a Member State. The relationship between

[164] Article 15(1) of Brussels II *bis;* as discussed herein at p.43 and 48.

[165] Pursuant to the Practical Handbook on the Operation of the 1996 Convention, p. 133, the "rights of custody" referred to in Article 7 are those that have been attributed under the law of the State in which the child was habitually resident immediately before the wrongful removal or retention (Art. 7(2)) available at https://assets.hcch.net/upload/handbook34en.pdf, last accessed 02 May 2016.

[166] Practice Guide (2005), *supra* note 30.

[167] The Regulation allows for the attribution of jurisdiction to the courts of the requested Member State in two situations only: *Situation 1*: The child has acquired habitual residence in the requested Member State and all those with rights of custody have acquiesced in the abduction *or Situation 2*: The child has acquired habitual residence in the requested Member State and has resided in that Member State for at least one year after those with rights of custody learned or should have learned of the whereabouts of the child and the child has settled in the new environment and, additionally, at least one of the following conditions is met: no request for the return of the child has been lodged within the year after the left-behind parent knew or should have known the whereabouts of the child; a request for return was made but has been withdrawn and no new request has been lodged within that year.

the Regulation and the Convention on Child Abduction is based on a seemingly simple formula that in matters covered by the Regulation this new law prevails over the provisions of the Convention on Child Abduction. However, before analysing in depth the interaction, the structure of the Regulation's provision should be given consideration.

Two aims are supposed to be met by Article 10. The wording has the objective of avoiding that the abductor initiates proceedings in the Member State to which the child was abducted and to have respect to a change in the habitual residence of the child which may have occurred.[168] By not generally denying the courts of the new habitual residence jurisdiction the rule remedies the alleged failure of the Convention on Child Abduction that the court of the State to which the child has been wrongfully moved may hear the case on the merits if the return of the child has been refused. However, the question is how much discretion the courts of the Member State have to determine if they have jurisdiction since there are temporal and substantive conditions. The courts of the former habitual residence retain jurisdiction under Article 10 even if the former habitual residence has been lost and the new habitual residence has not yet been acquired. This exceptional construct impedes that the courts of the state in which the child is present, i.e. the courts of the state to which the child was abducted, have jurisdiction. Jurisdiction of the courts of the former habitual residence is extended and only under exceptional circumstances the courts of the Member States with the new habitual residence acquire jurisdiction.

Article 10 followed by Article 11 by virtue of which the return of the child is organised judicially. Article 11 has the alleged aim of setting the rule for a return procedure not replacing the concept of the Convention on Child Abduction but complementing it.[169] As will be analysed in detail in the section on the relationship of the Regulation and the Convention in Chapters 3 A IV-V and 4 B

[168] "The Regulation aims at deterring parental child abduction between Member States and, if such nevertheless take place, ensuring the prompt return of the child to his or her Member State of origin", Practice Guide 2005*, supra* note 30, Chapter VII.
[169] Recital 17 of the Regulation "In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation".

I, the rule has not just completed the rules of the Convention but rather is a considerable change of the concept underlying the Convention in this respect.[170] Whilst Article 13 of the Convention on Abduction allows for a non-return order by the requested court, Article 11 of the Regulation prioritises the return of the child. As already set forth in Article 10, the courts of the former habitual residence maintain jurisdiction.

Decisions rendered in the State of the former habitual residence of the child have priority and with respect to litigation over the return of the child the priority is also granted by Article 11(8).

In general, the courts of the original habitual residence retain jurisdiction if the child is wrongfully removed or retained after having visited a person holding rights of access and the courts of the Member States to which the child was removed or where the child is retained do not have jurisdiction unless the child becomes habitually resident and either each person having rights of custody has acquiesced in the removal or retention or the child has resided in the state of wrongful removal for one year after those having rights of custody had actual or constructive knowledge of the residence and additionally, the child is settled in the new environment.[171] Whilst settlement in the new environment needs to be regarded as a cornerstone of habitual residence[172] and thus closely linked to the definition of this term wrongful removal is the central aspect in Articles 10 and 11. It is the initiating event for the concepts set forth in Articles 10 and 11 of the Regulation. The definition of wrongful removal in Article 2 (11) of the Regulation takes up the concept presented in Article 7(2) of the Convention on Child Protection.[173] Wrongful removal or retention shall never be sufficient to confer jurisdiction. In such a situation, the only competent courts are the courts

[170] McEleavy, P., *supra* note 25.
[171] Art 11 of the Regulation.
[172] Article 12 of the Convention on Child Abduction provides "The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."; Article 10 of the Convention takes up this idea: "[...] had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met [...]".
[173] Article 3 in the Convention on Child Abduction defines the term ''wrongful''.

of the State of origin and only under some conditions the courts of the State where the child has acquired a new habitual residence have jurisdiction. Those conditions are similarly worded than the conditions laid down in Article 7 of the Convention on Child Protection and are set forth as an alternative, as either the explicit acquiescence (sub-paragraph (a)) or the inactivity (sub-paragraph (b)) of the holder of rights of Custody is required. Each person having rights of custody has to acquiesce, and in case of joint custody, all the holders must acquiesce. Besides, acquiescence has a different value in the Regulation than in the Convention on Child Abduction. Pursuant to Article 16 of the Convention on Child Abduction, the courts of the new habitual residence can acquire jurisdiction over custody rights a non-return order, acquiescence being one of the multiple conditions necessary to obtain such an order. A non-return order is however sufficient to confer jurisdiction on the courts of the new habitual residence.

In contrast, under Article 7 of the Convention on Child Protection and Article 10 of the Regulation, a non-return order is not sufficient for the courts of the new habitual residence to acquire jurisdiction.

Acquiescence is required. Pursuant to sub paragraph (b) jurisdiction may shift if a child has settled, has actually spent a significant period of time in the environment and acquired a new habitual residence.

Additionally, the requirement is that the holder of the rights has not asked for the return of the child. For a significant period of time during which the child has settled in the new state a substantial finding by the court is required that the child “is settled in his or her new environment”.[174] Whilst this is the same wording as in Article 7 of the Convention on Child Protection, it is evident only with respect to the Regulation that judicial discretion will be exercised in the best interest of the child, as it is the general principle laid down in the Preamble.[175]

[174] Article 10 b of the Regulation.
[175] Regulation, recital (12).

However, Article 11 (8) of the Regulation provides, in any loophole situation, for priority of decisions of the Member State where the child was habitually resident prior to the removal, such priority also applying over a non-return order.

In the Regulation the condition of general inactivity is either fulfilled when the holder of the rights of custody has not lodged any request for the return of the child (point i), or has withdrawn the request (point ii). Such situation is also part of the two Conventions but with a different scope as will be explained later.[176] With complete inactivity the rule suggests that it is in the best interest of the child to give jurisdiction to the courts of the State to which the child has been abducted more than a year before, in which the child has settled, and from which the owner of the rights of custody has made no attempt to remove the child. The second assumed situation (point iii) is linked to the procedural particularities of the return procedure, but the aspect of inactivity of the holder of the rights of custody is maintained. As will be discussed in more detail in the specific chapter, Article 11 is the provision aiming at the organisation of a precise coordination between the Convention on Child Abduction and the Regulation. In that regard Articles 11(6) and (7) set forth the action that has to be taken in the courts of the State where the child was habitually resident.

The holder of custody who did not consent to the removal (the left behind) gets the chance to appear before the court of the State in which the child was habitually resident, such court having jurisdiction on the merits.

However, if the left-behind parent does not react within three months of the date of notification it can be assumed that he has either acquiesced or taken into account the non-return order and the courts of the new habitual residence of the child acquire jurisdiction over the merits.

As will be analysed in more detail in the chapter on interaction, it is hence possible that the proceedings have been closed in the State of origin before the one-year period expires. The court of the state of origin retains jurisdiction as

[176] as discussed at p.107 et seqq. and 142 et seqq. herein.

Article 11(7) states that the court seised shall close the case “without prejudice to the rules on jurisdiction contained in this Regulation”.

Further explanation is useful for understanding the implications of this aspect. As was mentioned, a key provision of the rules on jurisdiction regarding child abduction in the Regulation is the rule dealing with refusal of the court of the requested state to make a return order under Article 13.[177]

Pursuant to Article 11(7) the court must immediately notify the parties, who have three months to bring custody proceedings. This procedure was the subject of the reference to the ECJ in *Rinau*.[178]

In that case, during pending divorce proceedings in Germany, where the divorcing couple had lived throughout their marriage, the mother and child remained in Lithuania after a holiday. The German court provisionally awarded custody of the child to the father, the decision was upheld on appeal. The father then brought Convention proceedings for the child's return but this was refused by the Lithuanian court. Though the refusal to return was later overturned by the Lithuanian Court of Appeal and the children ordered to be returned to Germany, the enforcement of that decision was repeatedly suspended. Subsequently, the German court granted the divorce, awarded full custody to the father and ordered the mother to return the child, with an Article 42 certificate enclosed to the decision. As the mother brought proceedings in Lithuania for non-recognition of the German custody and return order under the Regulation, the proceedings were brought before the Supreme Court which then made the reference to the ECJ: given that the refusal to return had been overturned, had the German court correctly invoked Art 11(8)?.[179] Pursuant to the ECJ the German court had acted right and the Lithuanian court had to recognise and enforce the return order. Hence, an Article 11(8) judgment accompanied by an Article 42 certificate may only be issued following a decision not to return the child made by the requested state.

[177] Lowe, N., ‘A Review of the Application of Article 11 of the Revised Brussels II Regulation’, IFL (2009), 27-34.
[178] *Rinau*, *supra* note 19.
[179] ibid.

Pursuant to the Court it was irrelevant for the purposes of issuing a certificate that the non-return decision had been 'suspended, overturned, set aside or, in any event, has not become res judicata or has been replaced by a decision ordering return, insofar as the return of the child has not actually taken place'; and "the requested court must therefore declare the enforceability of the certified decision and allow the child's immediate return". Hence, to conclude on Article 11, the most notable element of Article 11 is the mechanism which is applied where a non-return order is made on the basis of Article 13; the authorities in the State of the child's habitual residence may thereby rule on whether the child should be sent back notwithstanding the non-return order. If a subsequent return order is made under Article 11(7) of the Regulation and is certified by the issuing judge, this return order is automatically enforceable in all EU-Member States.[180] *Rinau* also touches upon other interesting aspects in respect to the Regulation which will be examined in the respective chapters. It is suggested that the legislator has taken a courageous step when including abduction in the Regulation not least since there are four major differences in applications made under the Regulation in comparison to those made under the Convention.[181] As will become even more evident in Chapters 3 A and 4 on the interrelation of the Convention and the Regulation, it was a far-reaching approach to include a matter covered by the Convention with the Regulation, with obvious implications on cases involving Member and non-Member States.

[180] Article 11(7) of the Regulation - Return Order Granted: Re A (Custody Decision after Maltese Non-Return Order) [2006] EWHC 3397; Article 11(7) of the Regulation - Return Order Refused: *Re A HA v MB* (Brussels II Revised: Article 11(7) Application) [2007] EWHC 2016 (Fam), [2008] 1 FLR 289.

[181] The court is required to hear the views of the child unless this appears inappropriate having regard to the age or degree of maturity of the child, Article 11(2). 2. The court is required to hear the views of the applicant parent if it is considering not to return the child, Article 11(5). 3. The court may not refuse to order a return even if a defense of grave risk to the child has been made out under Article 13(b) of the Hague Convention provided it is established that adequate arrangements have been made to ensure the protection of the child after his or her return. 4. If an order refusing a return has been made, the applicant or abducting parent may –within three months of the non-return order- request the court of the country from which the child was abducted to hear and determine the issue of custody/residence of the child.

7. Prorogation of jurisdiction

Article 12 enables a court of a Member State in which the child is not habitually resident to decide on a case either because the case is connected with a pending divorce proceeding, or since the child has a substantial connection with this Member State. The Article refers to two situations - first if divorce proceedings are pending in a Member State, the courts of that Member State do have jurisdiction in matters of parental responsibility connected with the divorce[182] and second, the courts of a Member State may have jurisdiction in matters of parental responsibility even if the child is not habitually resident but when there is a substantial connection and proceedings are pending other than for divorce, legal separation or marriage annulment on a ground of jurisdiction set out in Article 3. The question of what a substantial connection is has indirectly been dealt with in a preliminary reference to the European Court of Justice in *L v M, R and K.*[183]This reference raised the question as to whether Article 12(3) must be interpreted as establishing jurisdiction over proceedings concerning parental responsibility even where no other related proceedings are pending. The Court answered in the affirmative. Furthermore, it held that Article 12(3)

"*must be interpreted as meaning that it cannot be considered that the jurisdiction of the court seised by one party of proceedings in matters of parental responsibility has been 'accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings' within the meaning of that provision where the defendant in those first proceedings subsequently brings a second set of proceedings before the same court and, on taking the*

[182] Pursuant to the Practice Guide (2005), *supra* note 30, the court of the divorce proceedings has jurisdiction provided the following conditions are met: when at least one of the spouses has parental responsibility in relation to the child, and the spouses and all holders of parental responsibility accept the jurisdiction of the divorce court, whether by express acceptance or unequivocal conduct **and** (emphasis added) The jurisdiction of that court is in the superior interests of the child. This superior interest is equal to the best interest pursuant to the explanation of the Practice Guide, section VI.

[183] Case C-656/13, *L v M, R and K,* [2015] OJ C16/8

first step required of him in the first proceedings, pleads the lack of jurisdiction of that court."[184]

Another preliminary reference was brought to the ECJ by the Court of Appeal in the case *E v B*[185] In this case the question was, if, where there has been a prorogation of the jurisdiction of a court of a Member State in relation to matters of parental responsibility pursuant to Article 12(3), prorogation of jurisdiction only continues until there has been a final judgment in those proceedings or does it continue even after the making of a final judgment. The European Court of Justice gave a preliminary ruling that jurisdiction which had been prorogued under Art 12(3) of the Regulation in favour of a court of a Member State before which proceedings were brought by mutual agreement of the holders of parental responsibility ceased following a final judgment in those proceedings. However, in both situations under Article 12(3) the cornerstone requirement is the child's best interest.

Only if no habitual residence can be established and if no jurisdiction is allocated by means of Article 12, the courts of the Member State in which the child is present have jurisdiction under Article 13(1) of the Regulation. With no decisions on Article 13 by the European Court of Justice except for *Mercredi v Chaffe*[186] and no explanation in the Practice Guide it is hard to establish the legislator's intention behind this article and it remains to be seen how Article 13 will be applied in the national courts.

8. Rules on derogation in favour of national law

In a provision on parental responsibility equivalent in its effect to the provision regarding divorce cases, Article 7, Article 14 refers jurisdiction to the respective Member State's national law on private international law if no court has jurisdiction pursuant to Articles 8 to 13. As the Green Paper on Brussels I[187]

[184] ibid, para 59.
[185] Case C-436/13, *E v B*, OJ C421/14.
[186] *Mercredi v Chaffe*, *supra* note 130.
[187] Green Paper on the re view of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, *supra* note 66.

suggested amendments to the equivalent rule in Regulation No. 44/2001, it remains to be seen if amendments will be proposed with regard to Articles 7 and 14 of Brussels II *bis*. Such amendments seem unlikely since the last Green Paper solely referred to jurisdiction with regard to divorce and Rome III was the result.[188] The most recent suggested amendments to Brussels I[189] proposed the removal of the rule so as

"to promote the interests of claimants and defendants and promote the proper administration of justice within the Union, the circumstance that the defendant is domiciled in a third State should no longer entail the non-application of certain Union rules on jurisdiction, and there should no longer be any referral to national law."[190]

Under the revised Brussels I Regulation, the situations in which national law is referred to are now reduced since the revised Regulation provides for further exceptions to the rule referring to the national rules on private international law by addressing a number of circumstances under which Member State courts can exercise jurisdiction even if the defendant is not domiciled within the EU.[191] It will have to been seen if a solution to this loophole in Article 14 is brought up by the EU Commission.

[188] Green Paper on applicable law and jurisdiction in divorce matters, COM/2005/0082 final, published on 14 March 2005, not published in the OJ, available at http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33255_en.htm, last accessed 02 May 2016; as the subject matter of the paper is divorce only, Article 14 is not mentioned.

[189] Proposal for a Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) COM(2010) 748 final: The proposal would have extended the Regulation's jurisdiction rules to third country defendants. This amendment would have generally extended the possibilities of companies and citizens to sue third country defendants in the EU because the special rules of jurisdiction which e.g. establish jurisdiction at the place of contractual performance become available in these cases. More specifically, the amendment would have ensured that the protective jurisdiction rules available for consumers, employees and insured will also apply if the defendant is domiciled outside the EU. The proposal further harmonises the subsidiary jurisdiction rules and creates two additional fora for disputes involving defendants domiciled outside the EU.

[190] ibid.

[191] Article 6 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.

II. General assessment – jurisdictional structure

The set of rules on the determination of jurisdiction in Brussels II *bis* are built on the assumption that the courts of the Member State in which the child or children is/are habitually resident are best suited to assume jurisdiction over cases of parental responsibility and abduction. The general rule is not complex itself, rather the lack of a definition of how habitual residence should be determined made it difficult for the national courts to apply the rule. With the explanatory decisions presented in *Mercredi v Chaffe*[192] and *Proceedings brought by A*[193] national courts now have a guideline how to determine habitual residence under the Regulation. However, as discussed, there are exceptions to the general rule. Articles 9, 10, 12 and 13 define the requirements for the courts of a Member State in which the child is not habitually resident to have jurisdiction under the Regulation. Article 9 and 15 have been praised in the original Practice Guide[194] as being "innovative", in the 2014 edition, such praise was limited to Article 15.[195] Article 15, which establishes a sui generis *forum non conveniens* jurisdiction for national courts only in relation to children in situations where it is deemed that the transfer of a case to another court would be in the child's best interests, is a novelty. However, this novelty results from the fact that the Regulation applies to parental responsibility *and* divorce proceedings. Quite a number of cases have been decided on the interpretation of Article 15.[196] In the Court of Appeal case of *Re M*[197] where the child with Czech nationality had always been resident in England and Wales and was in foster care, the issue of the conditions for a transfer were critically examined. The court held that the power to transfer under Article 15 was is an exception to the general rule of jurisdiction under Article 8 and that exceptions to general principles had to be narrowly interpreted. Confirming the approach in *AB v*

[192] *Mercredi v Chaffe, supra* note 130.
[193] *Proceedings brought by A, supra* note 17.
[194] Practice Guide for the application of the Regulation (2005), *supra* note30, section II 2 and III.
[195] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 3.3.
[196] *Re M* (A Child) [2014] Fam Law 966, [2014] 2 FLR 1372, [2014] EWCA Civ 152, [2014] 2 FCR 585, [2014] WLR(D) 92.
[197] ibid.

JLB[198] and thereby clarifying the difficulties of the interpretation of Article 15, the Appeal Court's decision can be regarded as at least a step forward. But this is a step forward in the English courts. There is no authoritative interpretation by the ECJ. As Munby J argued "the ambit of the discretion is likely to be limited in most cases, for the court cannot direct a transfer unless all three conditions are met while, on the other hand, since the discretion is exercisable only if the court has satisfied itself both that the other court is "better placed" to deal with the case than it is and that it is in the best interests of the child to transfer the case,"[199] This case makes more than evident how difficult it has been for the national courts to interpret exceptional rules in the Regulation the concept of which is 'innovative' in the view of the European legislator,[200] but distinct from well-known concepts.

With regard to jurisdiction in abduction cases, the Regulation is based on the seemingly simple approach that it applies whenever a child is habitually resident in a Member State where a child has been abducted to or from a Member State.

The conditions set forth in Article 10 are alternatives, either the explicit acquiescence or the inactivity is required.[201]

[198] *AB v JLB* [2008] EWHC 2965 (Fam) para 36.
[199] ibid; as discussed herein at p. 50, 54, 69, 106, 140, 152 et seqq..
[200] Practice Guide (2005), *supra* note 30, section II 2 and III.
[201] Sub-paragraph (a) and sub-paragraph (b) of Article 10.

B. The context of orders, provisional measures and matrimonial matters

I. This part of the chapter addresses the particularities of the rules on orders, the Regulation's and the ECJ's interpretations of the concepts regarding provisional measures, and the case-law on measures in complex situations where children are resident in third states, where there are parallel proceedings or where it is difficult to determine the place of habitual residence of the child, all with a view on whether the best interests are endangered or preserved. The Regulation's rules regarding court orders, provisional measures and the best interests

Provisional measures have been an issue of discussion in the context of the first European provisions on jurisdiction, enforcement and recognition. Under the processor of Brussels I, the Brussels Convention,[202] the ECJ as early as in 1990 considered the question of provisional measures.[203] Pursuant to Article 31 of Brussels I an individual may apply to the court of another Member State for provisional measures prior to the judgment even if a court in a Member State was first seised. However, the provision does not provide an applicant with a remedy but solely permits Member States to provide reliefs the respective domestic law allows for. Whilst the case-law on provisional measures under Brussels I was already quite disputed[204], the rules on provisional measures in Brussels II *bis* are even more complex.

According to the *Van Uden* doctrine of the ECJ[205] the granting of provisional and protective measures requires a real connecting link between the subject-matter of the measures sought and the forum. However, it remains unclear whether a 'real connecting link' is similar to the minimum contacts test found in

[202] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
[203] Case C-115/88 *Mario Reichert et al v Dresdner Bank*, [1990], ECR 1-27, para 34.
[204] Dickinson, A., 'Provisional Measures in the "Brussels I" Review: Disturbing the Status Quo?' (2010) 6 JPIL Law 519.
[205] Case C-391/95, *van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line et al* [1998] ECR I-7091, I-7135.

US law, mentioned further above,[206] or whether it imposes a territorial restriction.[207] Brussels II *bis* is different insofar as Article 20(2) imposes a requirement as to the temporary nature of the measure, a scheme adapted from the Hague Convention on Child Protection. However the wording of Article 31 makes evident that the temporary nature is equally necessary. Though in *van Uden* the Court held that the limitation of Article 3 does not apply to provisional measures, neither Article 31 Brussels I nor Article 20 Brussels II *bis* create a new basis for jurisdiction. The basis for jurisdiction lies in national law and the ECJ has underlined the necessity of limiting the exorbitant use of interim protective measures.[208] Provided that the courts of any Member State have jurisdiction, Article 31 is applicable, however the main proceedings should never be neglected.[209] Even if provisional measures may be granted after a judgment but before a declaration of enforceability in accordance with Article 47(1), it must be remembered that those measures are of a temporary nature.

For both Brussels II *bis* and the Hague Conventions it seems adequate to argue that the court must *"ensure that provisional measures are not used to frustrate internationally agreed principles of jurisdiction"*, an argument mentioned by Lawrence with regard to Article 31.[210]

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[206] Whilst the US courts return to applying the concept developed in International Shoe (International Shoe Co v Washington (1945) 326 U.S. 310, 319; CompuServe, Inc. v Patterson, 89 F.3d 1257 (6th Cir 1996) to examine the defendant's "minimum contacts" with the forum state, Article 2 and the requirement of domicile are not built so as to allow for considerations of litigation fairness. Brussels I places an emphasis on the obligation underlying the dispute and Articles 15-16 are designed to be protective pursuant to such a contractual obligation. Brussels II *bis* has a different emphasis; Schlosser, Hess, B., Pfeiffer, T., Schlosser, P., Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, September 2007, p.104, at http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/study_application_brussels_1_en.pdf, last accessed 02 May 2016, p.133 et seq. illustrates the disadvantages of a lack of certainty in the Member States' courts- this is even more tragic in child custody cases.

[207] Schulz, A., 'Einstweilige Maßnahmen nach dem Brüsseler Gerichtsstand- und Vollstreckungsübereinkommen in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften (EuGH)' (2001) Zeitschrift für Europäisches Privatrecht 805-836; Warner, S., Middlemiss, S., 'Patent litigation in multiple jurisdictions: an end to cross border relief in Europe?', Case Comment, (2006) EIPR, 28(11), 580-585.

[208] *van Uden*, *supra* note 205, for a comment on this particular issue in Aird, R. 'Interim protective measures which provide security towards a common security measure' (2002) CJQ 21(Jul), 271-281.

[209] *van Uden*, *supra* note 205.

[210] Lawrence in *Wermuth v Wermuth* (*No 1)* [2003] 1 FLR 1022, para.38.

In *Proceedings regarding A* the Court refused to apply the case-law on Article 24 of the Brussels Convention, - the predecessor of Article 31 of Brussels- I, to the provisional measures ordered in accordance with Brussels II *bis*.[211] Under Brussels I with its entirely commercial focus provisional measures aim at maintaining a factual or legal situation. Due to the provisional interference with defendant's rights, the court must take a decision as to which measures are ordered.[212] The aim of provisional measures in a commercial case differs from the aim of those ordered in accordance with Brussels II *bis*. Jurisdiction with regard to a provisional measure under Brussels II bis has a totally different aim. It is a significant tool in urgent cases, in which a provisional arrangement in respect of the persons, and in particular of course the children, concerned is substantial while, at the same time, the substance of the matter is or will be decided elsewhere. Applications for interim relief may either be filed before the court which has jurisdiction as to the substance of the case, or before another court pursuant to the conditions set out by Article 20 of the Regulation. Brussels II *bis* does not set forth that a request for provisional relief may be stayed just because jurisdiction is considered to be exclusively vested in the court which is competent to hear the main proceedings.[213]

Article 20 allows a court take steps to protect a party even if this court does not have jurisdiction under Brussels II *bis*. In *Purrucker II*[214], in 2010, the ECJ referred back to *Purrucker I*[215] and noted that Article 20 of the Regulation may not be regarded as a provision which determines substantive jurisdiction. It further noted that due to the objective of the Regulation to ensure, "in the best interests of the child, [that] the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions."[216]

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[211] *Proceedings regarding A*, *supra* note 17.
[212] *van Uden*, *supra* note 205.
[213] Case C-296/10, *Bianca Purrucker v Guillermo Vallés Pérez* ('*Purrucker II*') official summary of the judgement para 3.
[214] ibid.
[215] Case C-256/09, *Bianca Purrucker v Guillermo Vallés Pérez* ('*Purrucker I*').
[216] *Purrucker II*, *supra* note 213, para 84.

It further held that the provisions of Article 19(2) (court second seized must stay proceedings where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States) are not applicable where a court first seised is solely seised for the purpose of provisional measures within the meaning of Article 20 of the Regulation and where a court of another Member State having jurisdiction with regard to substance of the cause is seised second of an action directed at obtaining the same measures.[217] In this case, all parties who submitted observations agreed that there cannot be *lis pendens* between an action brought to obtain provisional measures within the meaning of Article 20 and an action initiating substantive proceedings.[218] The Court's repeated reference to the best interests of the child demonstrates the emphasis it lays on respecting Recitals 12, 16 and 21 of the preamble.[219] It argued that, when the interest of the child requires a judgment which may be recognised in Member States other than that of the court second seised, that it is the duty of that court to proceed with consideration of the action brought before it if a reasonable time has passed since the party claiming *lis pendens*, the court first seised and the central authority were contacted to determine the cause of action of proceedings and jurisdiction.[220] *Purrucker* was a complex case insofar as there were three sets of proceedings: the first, brought by the father in Spain regarding provisional measures and rights of custody, the second, brought in Germany by the father, regarding the enforcement of the judgment of the Spanish court granting provisional measures and the third, brought by the mother in Germany, regarding the award of rights of custody. The proceedings

[217] ibid.

[218] ibid, Observations submitted on behalf of: Ms Purrucker, by B. Steinacker, Rechtsanwältin; the German Government, by J. Möller and J. Kemper, acting as Agents; the Czech Government, by M. Smolek, acting as Agent; the Spanish Government, by J. López-Medel Báscones, acting as Agent; the Italian Government, by G. Palmieri, acting as Agent, and by G. Russo, avvocato dello Stato; the Hungarian Government, by R. Somssich, K. Szíjjártó and S. Boreczki, acting as Agents; the Portuguese Government, by L. Inez Fernandes, acting as Agent; the United Kingdom Government, by H. Walker, acting as Agent, and by K. Smith, barrister; the European Commission, by A.-M. Rouchaud-Joët and S. Grünheid, acting as Agents.

[219] *Purrucker I*, supra note 215, reference is made in paras 15, 36 and 91.

[220] *Purrucker I*, *supra* note 215, as suggested in para 36.

commenced in Germany to obtain enforcement of the judgment of the Juzgado de Primera Instancia[221] gave rise to the judgment in *Purrucker I*.[222]

Purrucker clarified some fundamental questions concerning the enforcement of provisional measures. It made clear that, if a court having jurisdiction because of one of Articles 8–14 of the Regulation adopts provisional measures regarding custody, the recognition and enforcement of those measures in the other Member States is governed by Article 21 et seq. Conversely, if a court, which has not based its jurisdiction on Article 8 et seq., adopts a provisional measure, Article 21 et seq. are not applicable.

Emphasising that the courts have to distinguish provisional measures of a court with jurisdiction as to the substantive matter from measures based on Article 20, the ECJ made clear that the respective court has to establish whether the court of origin based its jurisdiction on Article 8 et seq. of the Regulation or not. Criticising the Spanish court, the ECJ stated that a decision may be assumed to have been adopted in accordance with the jurisdiction rules of the Regulation if an order for a provisional measure contains a correct reasoning concerning its jurisdiction in respect to the substantive matter. To refer back to the original question, the German Federal Court had submitted to the ECJ: The Federal Court requested whether the provisions laid down in Article 21 et seq. of the Regulation also apply to enforceable provisional measures, relating to rights of custody, within the meaning of Article 20 of the Regulation. The ECJ ruled that the provisions laid down in Article 21 et seq. of the Regulation "do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation".[223]

It may be argued that Article 20 can only ever be used in very exceptional circumstances[224]. In *Purrucker I* the ECJ laid a strong emphasis on the

[221] The Spanish court system is not as simple as the English one. This court is a lower court, OLG Stuttgart (higher regional court in Germany) of 22 September 2008 ordered the enforcement of a judgment of the Juzgado de Primera Instancia No 4 of S an Lorenzo de El Escorial (Spain) awarding custody of those children to their father.

[222] *Purrucker I, supra* note 215.

[223] ibid.

[224] Mostyn QC in *AL and ML* [2006] EWHC 3631 (Fam).

character of provisional measures- on the one hand it argued that the importance of the provisional measures and their possible consequences for young children required that a person affected by such a procedure, even if that person has been heard, should be able to bring an appeal against the judgment ordering those measures in order, so as to dispute that the conditions set forth in Article 20 of the Regulation were satisfied,[225] before a court which is different from the court which adopted the measures and which is capable of ruling promptly – inter alia, to challenge the substantive jurisdiction which that court attributed to itself, or, if it is not evident from the judgment that that court had, or had attributed to itself, substantive jurisdiction on the basis of that regulation, to dispute that the conditions set out in Article 20 of the Regulation as restated in this judgment,[226] were satisfied. Then again it argued that "it should be possible to bring that appeal without the fact of doing so creating any legal presumption whatsoever that the person bringing the appeal accepts the substantive jurisdiction which the court which adopted the provisional measures may have attributed to itself."[227] In *Purrucker II* some issues were reviewed.[228] The Oberlandesgericht Stuttgart (Higher Regional Court)[229] had decided that Article 19(2) of the Regulation is not concerned with the relationship between the substantive proceedings and proceedings for provisional measures as those proceedings have different objectives. Amtsgericht Stuttgart (district court) stayed proceedings and referred three questions to the Court of Justice for a preliminary ruling:

"(1) Is Article 19(2) of Regulation [2201/2003] applicable if a court of a Member State first seised by one party to resolve matters of parental responsibility is called upon to grant only provisional measures and a court of another Member State subsequently seised by the other party of an action with the same object is called upon to rule on the substance of the matter?

[225] *Purrucker I*, *supra* note 215, para 97.
[226] ibid, para 77.
[227] ibid.
[228] *Purrucker II*, *supra* note 213.
[229] ibid.

(2) Is [Article 19(2)] also applicable if a ruling in the isolated proceedings for provisional measures in one Member State is not capable of recognition in another Member State within the meaning of Article 21 of the Regulation?

(3) Is the seising of a court in a Member State for isolated proceedings for provisional measures to be equated to seising as to the substance of the matter within the meaning of Article 19(2) of the Regulation if under the national rules of procedure of that State a subsequent action to rule on the substance of the matter must be brought before that court within a specified period in order to avoid adverse procedural consequences.""[230]

Purrucker I and *Purrucker II* provide a good insight into what the ECJ considers the rationale behind the Regulation's rules on provisional measures and the relationship with the other rules on substantive jurisdiction. It provided a guideline as to how to determine whether a court is 'first seised' as to substance or as to provisional measures.

As of particular interest with respect to the best interests of children, the ECJ ruled that the court second seised is not required to wait forever for the information from which it can determine whether it can assume jurisdiction. Whilst this works in support of the provision of provisional measures, there is still the question clarify what is to happen if conflicting rulings as to the substance of the matter are eventually delivered.[231]

In the English courts the difficulties have been noted. As Lawrence Collins J observed in *Wermuth No 2*,[232] 'provisional measures vary from one context to another, and from one country to another, but what they have in common is that their object is to ensure that the rights of parties'. Referring back to *Reifert*[233] in

[230] *Purrucker II, supra* note 213, para 5.
[231] This question has not yet been dealt with in the courts.
[232] *Wermuth v Wermuth (No 1), supra* note 210 regarded a divorce action commenced in Germany. Before the German court had considered whether it was first seised, the wife applied to the English court for maintenance pending suit; the German court assumed jurisdiction and the husband appealed the English order; the Court of Appeal held that the order to pay a sum for an indefinite period undermined the proper function of the German proceedings, as the German court was the court first seised.
[233] *Mario Reichert and Others v Dresdner Bank AG*, *supra* note 203, para. 34.

Wermuth v Wermuth No 2[234] the Court of Appeal gave a valuable interpretation, stating that the provision could only be invoked in order to order measures intended to preserve a factual or legal situation in one Member State so as to protect rights which are the subject matter of litigation in the court of another Member State having jurisdiction as to the substance of the matter. In *Wermuth*, the court held that an application for a pending maintenance suit cannot be categorised as a protective measure or as a provisional measure.[235] Neither Article 31 of Brussels I nor Article 20 of Brussels II *bis* should "be used illegitimately to seize jurisdiction validly vested in the first court".[236]

Provisional measures after a judgment in the main proceedings are not envisaged by Brussels II *bis.* In *M X v Mme Y*[237] the French Supreme Court ruled on Article 20 in a case where a Norwich court had held the children's residence to be at their mother's in England, and had made orders in respect of the father's rights regarding visits and stays. Relying on an order delivered in France giving him temporary custody of the children, the father had not returned the children to England after a Christmas holiday. The mother had then immediately applied in England for the return of the children on the basis of the Convention on Child Abduction (notably not referring to Brussels II *bis*). The High Court in London admitted the application by the public prosecution service for the return of the children to England and ordered the return. As the father's appeal was dismissed, the case was brought before the French Supreme Court, after it had been dealt with by the Poitiers Court of Appeal. Not referring to any case law, the Supreme Court ruled that under the terms of Article 20 a court in charge of children's matters could, in the case of an emergency, take temporary or protective measures necessary in respect of children whose custody was in another Member State but that those orders of the court were ineffective if the court which had jurisdiction to rule on parental authority delivered a judgment with provisional measures placing the children under the court's guardianship

[234] *Wermuth v Wermuth (No 2)*, *supra* note 232; Clarkson, C., Hill, J., 'T*he Conflict of Laws'*, 2nd *edn.* London 2002, p.139.
[235] *Wermuth v Wermuth (No 2)* [2003] 1 FLR 1029.
[236] Case Comment, 29 Sep 2006 on *Re ML and AL* (Children) [2006] EWHC 2385 (Fam).
[237] *M X v Mme Y* [2010] I.L.Pr. 50, French Cour De Cassation (Supreme Court) (First Civil Chamber) 08-42, 843 and 844.

upon their return.[238]It will be discussed in the context of the analysis of the interaction of the Regulation and the Convention in Chapter 3 A whether it was correct that both courts referred to the Regulation and the Convention though no third state was involved but it shows, already in this context, how important the interaction has become.

On 23 December 2009, the ECJ had delivered its judgment in a case which could have been respected by the French Supreme Court in the above case. *Detiček*[239] concerned the question whether a court of the Member State in which the child is present may order protective measures on the basis of Article 20 though a court of another Member State having jurisdiction as to the substance of the matter has ordered a protective measure enforceable in the Member State where the child is present. According to the ECJ it may not order such a protective measure– the Court emphasised the continuing jurisdiction of the State of the former habitual residence of a child on the merits of custody[240], and referred to the obligation of other Member States to enforce a return order.[241] Based on teleological and systematic arguments, the Court referred to the systematic aspect of the enforcement of decisions of another Member State and the avoidance of wrongful removals. The question in this context is whether this approach also is the child's best interest as there might be a need for provisional measures if the factual situation has changed significantly subsequent to the first decision. According to the Court, though the Italian courts had jurisdiction as to the substance of the matter under Article 8, the Slovene courts were entitled to order provisional measures under Article 20. The Court referred to the conditions set out in *Re A*.[242] It further held the Slovene court's analysis that Article 20 was urgent due to the child's integration into a new environment to be incorrect. Drawing the distinction between habitual residence and an integration of the child based on an unlawful removal, the Court held that such integration could not entail any legal consequences.

[238] Ibid.
[239] Case C-403/09 PPU Deticek v Sgueglia, [2009] ECR I-12193.
[240] Schulz, A., *supra* note 31.
[241] *Detiček v Sgueglia, supra* note 239.
[242] *Re A*, *supra* note 180.

Hence, jurisdiction based on urgency, as it is embedded in Article 20 of the Regulation, permits a court which does not have jurisdiction in accordance with Brussels II *bis*, to take provisional measures under the *lex fori* with regard to the child.

Rauscher and Mankowski have suggested that the limited scope of the provision in Brussels II *bis* would be adjusted once the Convention on Child Protection came into force in the Member States of the Community as Article 11 would then provide the opportunity to order measures on the basis of urgency even in situations in which the child is resident in a Member State to Brussels II *bis*.[243] It seems unlikely that the Court, -though aware of the concepts adopted from the Conventions and the interaction of the Regulation and the Convention on Child Abduction with regard to the recognition and enforcement of judgments-, will support this interpretation. As will become even more evident in the chapter on interaction the ECJ has been firm as far as the precedence of the Regulation's provisions on jurisdiction over any other rules are concerned. The above assessment of Article 20 demonstrates that the ECJ has clear views on the interpretation of the core elements of the rule in the context of the Regulation but that specific questions come up rather regularly.[244] This makes the interaction with the Hague Convention – in particular in view of the child's best interest- rather complicated as will be explained later. The issue of provisional measures makes evident that

"we have to move forward beyond sporadic or erratic and insecure direct judicial communications enabled under the scope of the Brussels II bis Regulation."[245]

Shortly after *Purrucker*, the ECJ dealt with *Povse*[246] under the expedited procedure for family law cases with the preliminary reference lodged on 3 May and judgment delivered on 1 July – in short, the Court held that the enforcement

[243] Rauscher T./Mankowski, P., *Europäisches Zivilprozessrecht, Kommentar*, München 2nd edition 2006, Article 12 Brussel II-VO.
[244] *Detiček v Sgueglia, supra* note 239; Case C-211/10 *Povse v Alpago* [2010] 2 FLR 1343, and *Purrucker II supra* note 213.
[245] Forcada Miranda, F., 'Mutual trust in the field of enforcement without exequatur of return and access orders under the Brussels II *bis* Regulation and the new challenges in international family law: case-law and practical experience' (2012) IFL March 39-42.
[246] *Povse v Alpago, supra* note 244.

of a certified judgment requiring the return of the child may not be refused because of a judgment delivered subsequently by a court of the Member State of enforcement nor because of a change of circumstances after its delivery. Why is *Povse* relevant with respect to provisional orders? In the reference, the ECJ was requested to decide on the application of Article 11(8) to return orders issued in the context of an interim custody order. Pursuant to the ECJ, a decision of a court of a Member State with jurisdiction which requires the child's return falls under Article 11(8) even this Member State's court has not issued a final decision on custody. As the analysis moves on to the difficulties regarding recognition and enforcement, this case will be assessed again, having regard to the Court's findings on return orders.

II. General assessment - provisional measures

Provisional measures are a cornerstone of the Regulation. Some of the aspects not considered by the ECJ in *Purrucker I* were addressed in *Purrucker II*, when the German court sought a further preliminary ruling with regard to the applicability of the *lis pendens* provisions of Brussels II *bis* in the context of the effect of an order granting provisional measures, and as to whether the seising of a court in a Member State for provisional measures is equal to the seising as to substance under the relevant provisions.[247]

The judgments reflect the ECJs´ confidence in the proper functioning of mutual trust and cooperation between the Member States. It argued that the court second seised may seek information from the party relying on the objection of *lis pendens* and that court second seised may advise the court first seised that an action has been brought before it, ask the court first seised to send to it information on the action pending before it and to state

"*its position on its jurisdiction within the meaning of Regulation no 2201/2003 or to notify it of any judgment already delivered in that regard*".[248]

[247] *Purrucker II*, *supra* note 213.
[248] ibid, para 82.

It recognised that the court second seised must proceed to determine the action brought before it if those measures are of no avail. It underlined that a reasonable waiting period must be determined by the court having regard above all to the interests of the child,

"to ensure, in the best interests of the child, that the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions."[249]

Purrucker clarified some significant questions concerning provisional measures and the scope of Article 20 of the Regulation. Article 20 does not confer any jurisdiction but rather permits for interim measures and such measures cease to have effect once the competent court has taken the measures appropriately. Interim measures may not be used to hinder a return order issued by the state of the habitual residence or to block the main proceedings.[250] ***Detiček*** has made clear to the national courts that Article 20 allows the Member States courts to order interim measures pursuant to their own law but that this competence has to be interpreted strictly and does not allow a Member State to order a provisional measure where a court of another Member State, which has jurisdiction under that Regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the previous Member State. According to this decision, once such measure has been taken it has to be recognised pursuant to Articles 21 et seqq. of the Regulation. But then again, there is disagreement on this aspect and in Purrucker I the ECJ decided that Article 20 provisional orders do not enjoy immediate recognition in fellow Member State courts. some scholars contest that measures taken pursuant Article 20 are not enforced

[249] ibid, para 84.
[250] ibid, *Detiček v Sgueglia, supra* note 239.

pursuant to Article 21 et seqq. but under national law.[251] Rauscher insists that enforcement should follow Articles 21 ff.[252]

Based on the guidelines the ECJ has provided in the cases discussed in this section on the application of provisional measures under the Regulation, it is suggested that a strict application of Article 20 can very well safeguard the interest of the child involved in respective cases. One must not be as pessimistic as Wright, who argues that, because of the possibilities to misuse the provision, when children just 'pass through' a Member State, a narrow interpretation is required.[253] A careful interpretation is always required to secure the interest of the child concerned but not the rule itself but rather its misuse by national courts is the inherent danger. The difficulties of carrying out the exchange of information as well as the goodwill of the courts in the 'pass through' State make it cumbersome to find a good solution in the interest of the child. There were cases with complicated international ping-pong proceedings, attempts at transfer, appeals, and provisional measures in each jurisdiction.[254] In the context of recognition and enforcement it will become evident that the Regulation itself and the ECJ's ruling on provisional measures have been very progressive and adaptive to the fast movements of parents and their children within the Union's borders and beyond. There is, however, still uncertainty caused by the (mis)interpretation by the national courts[255] of the Regulation's rules on provisional measures. This again is often directly linked to the interrelation of the Regulation and the Convention with regard to the recognition of those measures and orders under one instrument in courts proceedings under the other, as will be assessed in the next chapter.

[251] Heiderhoff, B., 'Wann ist ein "Clean-Break" unterhaltsrechtlich zu qualifizieren' (2011) IPRax 2011, 37.
[252] Rauscher, EuZPR, 3rd edition 2010, Band II, Article 20 Rn. 23.
[253] Wright, M., 'Urgent Provisional Measures under Article 20 of Brussels II *bis* vs Principles of Comity' 2012 IFL, Feature.
[254] *M.A. v Austria*, Application No. 4097/13, 15 January 2015.
[255] *Povse v Alpago, supra* note 244.

III. The set of rules on divorce

Due to its limited significance with regard to the best interest of the child and the interaction of the Regulation and the Conventions, the set of rules on jurisdiction referring to divorces will only be discussed briefly, with an emphasis on the relation of those provisions and issues of parental responsibility. Nonetheless, the provisions on matrimonial matters, in particular since those are not included in the Hague Conventions, play a significant role in the framework of EC legislation on private international law in family matters and may not be disregarded as divorce and child custody are interconnected in the rules of the Regulation.

1. The structure and significance of the provisions in the framework of child custody law

Whilst there is no general jurisdiction rule in matrimonial matters, the jurisdiction rule in Article 3 sets out a complete, non-hierarchical system of alternative grounds of jurisdiction[256] and the prorogation rule of Article 12 defines that a court seised in divorce proceedings under the Regulation additionally has jurisdiction in matters of parental responsibility connected with the divorce if is in the best - which is referred to as the "superior"- interests of the child.[257] Article 7 is deviant from the very strict scheme of the other jurisdiction rules, most significantly from those in the context of parental responsibility. The Borras Report on the 1998 Convention on jurisdiction and the recognition and the enforcement of judgments in matrimonial matters[258] qualified Article 8 of the Convention (the provision equivalent to Article 7 of Brussels II *bis*) as being parallel to the provision in Article 4 of the 1968 Brussels Convention (Article 4 of Brussels I). Similar to Article 4 of Brussels I, the present Article 7 of Brussels II *bis* refers to the national rules on jurisdiction if neither the applicant nor the

[256] Borras Report, *supra* note 29, para 46 et seq..

[258] Borras Report, *supra* note 29, para 46 et seq.

respondent is resident in a Member State or if the applicant and the respondent do not have a common nationality. An applicant can refer to the national rules on jurisdiction only if the spouse is a national of a non-Member State habitually resident outside the EC legislative area or a citizen of a Member State habitually resident in a non-Member State (who then needs to be sued before the courts of the third state), as is set forth in Article 7. Pursuant to the judgement in *Sundelind,* which will be discussed in detail in the following, Articles 6 and 7 of Brussels II *bis* must be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot claim their jurisdiction to hear the petition on their national law if the courts of another Member State have jurisdiction under Article 3 of the Brussels II Regulation.[259]

2. The rules concerning matrimonial matters

Pursuant to the Practice Guide no distinction was intended by the drafters by the distinction between the term “superior interests of the child” (Article 12(1)(b)) and the best interest standard used in the remainder of the English language version.[260] Jurisdiction in accordance with Article 12 ends when the divorce action ends, with a decree absolute. Alternatively, pursuant to Article 12 the courts of a Member States can have jurisdiction when a child is not habitually resident but has a substantial connection with the country, all relevant parties agree to this allocation of jurisdiction and again it is in the best interests of the child. There is a clear rule on the meaning of ‘interest’ in the context of Article 12 in Article 12(4) only for cases in which the third state is a not a signatory to the Convention on Child Protection. With respect to the remainder, ‘best’ interest has been used.

In its second judgment on Brussels II *bis*, the ECJ underlined the high significance of Article 3, holding that Articles 6 and 7 of the Regulation must be

[259] *Sundelind Lopez, supra* note 34.
[260] Practice Guide (2005), *supra* note , p. 17.

interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State may not refer to their national law if the courts of another Member State have jurisdiction under Article 3 of the Regulation.[261] In this case, *Sundelind Lopez*, Mrs Sundelind, a Swedish national, married to Mr *Lopez* Lizazo, a Cuban national, the ECJ responded to a reference from a Swedish Court as to whether Brussels II *bis* applied in a case involving a non-Member State national and held that it does apply. The Court held that Articles 6 and 7 must be interpreted as meaning that where, in divorce proceedings, a respondent is neither habitually resident in a Member State nor a national, the courts of a Member State may not base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3.[262] Compared to the cases on parental responsibility there have been few cases where the ECJ was requested to interpret the jurisdiction rules on matrimonial matters.[263]

In *Hadadi*, having regard to Article 3 of the Hague Convention of 12 April 1930 on Certain Questions relating to the Conflict of Nationality Laws, Advocate General Kokott responded to the French *Cour de Cassation's* question whether Article 3(1)(b) was to be interpreted as meaning that in a situation where the spouses hold both the nationality of the state of the court seised and the nationality of another Member State, the nationality of the state of the court seised must prevail. The Advocate General argued that the court seised must consider the fact that the spouses also possess the nationality of the Member State of origin and that the courts of the latter state accordingly would have had jurisdiction in respect of the judgment.[264] Hence, she suggests that both courts in the Member State whose nationality is held by both spouses have jurisdiction since nationality is a connecting factor with regard to divorce, differentiating it from the emphasis on habitual residence in the context of child abduction. The Court held that where spouses each hold the nationality of the same two

[261] *Sundelind Lopez, supra* note 34.
[262] ibid.
[263] ibid*;* C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko*, *épouse Hadadi (Hadady).*
[264] ibid, opinion of Advocate General Kokott.

Member States, the jurisdiction of the courts of one of those Member States may not be rejected on the ground that the applicant does not have any other links with that State. It argued that the courts of those Member States of which the spouses hold the nationality have jurisdiction under that provision and that the spouses may seise the court of the Member State of their choice.[265]

Very often at the moment divorce proceedings commence questions concerning the custody of the children will arise and the jurisdiction of the divorce court will deal with both questions of divorce and parental responsibility, even if it is not the court of the habitual residence of the child. Under the original Brussels II Regulation, Article 3 was drafted as an extension of the divorce forum, so as to include parental responsibility. However, under the present Brussels II *bis* scheme, Article 12 is drafted as an exception to the general jurisdiction rule on parental responsibility, pursuant to which the courts of the habitual residence of the child have jurisdiction. The jurisdictional grounds pursuant to Article 12 are not exclusive so that the courts of the state of the habitual residence of the child are not deprived of jurisdiction in the circumstances referred to in Article 12. Whilst this is clearly in the interest of the children concerned, there are some difficulties. Several courts could be seised simultaneously of a dispute, a situation not new in Europe.[266] With respect to Article 12 of the Regulation de Boer's criticism is also directed towards what has been identified as the extraterritorial reach of the Regulation, hence situations in which the child is (potentially) habitually resident outside the EU and the case is nonetheless drawn into the EU. De Boer argues that "*Absent a convention on recognition and enforcement, there is no guarantee that protective measures rendered in one of the member states will be recognized and enforced in the non-member state of the child's habitual residence.*"[267] Whilst this uncertainty is clearly a problem, there are several advantages resulting from the strong link of divorce and custody proceedings and in fact any proceedings regarding the children concerned. It is contested that Article 12 is clear in its wording that the courts

[265] ibid.
[266] Mechanism regarding *lis pendens*, Article 19 of the Regulation.
[267] De Boer, Th., 'What we should not expect from a recast of the Brussels II bis Regulation', Netherlands Internationaal Privaatrecht 33(1), 10-19, p.14.

have to consider the best interests and furthermore the emphasis on the substantial connection underlines this clarity. The difficulty rather is that the term substantial connection leaves room for discretion.

There has hitherto been no ECJ ruling on Article 12 of the Regulation, the only of the jurisdictional rules which explicitly refers to the best interest of the child, however it may be assumed that difficulties in the national courts may arise from the fact that jurisdiction ends when the divorce action ends and for any following proceedings relating to parental responsibility the place of jurisdiction must be determined anew.

IV. Possible amendments and extension to children habitually resident outside the EU

Whilst the rules of recognition of Brussels II *bis* apply to all divorce judgments issued by a court of a Member State, the jurisdictional grounds are restricted to the situations referred to Articles 3 and 4 and the further principles set forth in Articles 6 and 7. Hence, for citizens of Member States living in a non-Member state, situations may arise in which none of the grounds of jurisdiction provided by Brussels II *bis* is applicable. This in turn, may cause severe difficulties for the jurisdiction in proceedings on parental responsibility. As far as the interlink of the jurisdiction rules on divorce and parental responsibility is concerned, in general, the divorce court will hear the parental responsibility only if there is a strong link. Therefore, the court of a Member State which has jurisdiction with regard to a divorce proceeding under Article 3 of Brussels II *bis* will also have jurisdiction to hear the question of parental responsibility pursuant to Article 12(1). However, this solution is possible only under three different conditions referred to in detail above and described in sub-paragraphs (a) and (b). With respect to possible amendments the European Commission has initiated a study.[268]The Proposal for a Regulation amending Brussels II *bis*[269] with regard

[268] European Commission, Green book on applicable law and jurisdiction in divorce matters, 14 March 2005, COM (2005) 82 Final, point 3.5 et seq.

to the provisions on divorce proposes to amend Article 7 so as to enable the courts of a Member State to assume jurisdiction even where none of the spouses is habitually resident in the territory of a Member State and do not have a common nationality of a Member State[270] provided that ‘‘the spouses had their common previous habitual residence in the territory of that Member State for at least three years; or one of the spouses has the nationality of that Member State, or, in the case of United Kingdom and Ireland, has his or her “domicile” in the territory of one of the latter Member States.’’[271] It is suggested that, though the above situation, in which none of the grounds of jurisdiction provided by Brussels II *bis* apply, may be unfavourable for the children concerned, new rules should be drafted so as to not go beyond what is necessary to achieve the objectives of the Treaty.[272] It particular, it may not be disregarded that the place of jurisdiction of divorce proceedings may also be the place of jurisdiction for the proceedings regarding parental responsibility. As the Select Committee on European Scrutiny suggests in its Thirty-Seventh Report[273] disputes related to ‘"international marriages" are not restricted to marriages between spouses of EU nationalities’ and possibly,

“the Hague Conference on Private International Law would more appropriately deal with this issue”.

This suggests that cases which extend beyond the fora of Brussels II *bis* are cases of an international rather than a European legal scope and are better dealt with by the existing Conventions than by the Regulation. Under Article 12 (4) the situation of the case needs to be considered particularly careful. In

[269] Proposal for a Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final.
[270] In the United Kingdom and Ireland, the rule reads differently and refers to spouses who do not have their “domicile” within the territory of one of the latter Member States.
[271] On 26 October 2006 the Governments of the United Kingdom and the Republic of Ireland chose not to opt-in to this draft Regulation.
[272] Article 65 EC.
[273] House of Commons, Select Committee on European Scrutiny, Thirty-Seventh Report, Deposited in Parliament on 26 July 2006, para 4.12, at http://www.publications.parliament.uk /pa/cm200506/cmselect/cmeuleg/34-xxxvii/34x06.htm, last accessed 01 May 2016.

absence of case law of the ECJ it is valuable to consider case law of the English Supreme Court. In *I (A Child)*[274], the Supreme Court decided that Article 12 could apply to a child lawfully resident outside the European Union, provided that the requirements laid down in the Article are fulfilled.

In this case the child had been resident in Pakistan since 2004, though the child and his divorced parents are all British citizens and the parents lived in Britain. As the High Court and the Court of Appeal held that the English courts did not have jurisdiction, the mother appealed to the Supreme Court as to whether Article 12 was applicable in cases where a child was resident in a non-EU member state and, if this was generally answered in the affirmative, whether there was jurisdiction pursuant to the criteria set out in Article 12.3 (b).

Based on three arguments, Lady Hale concluded that Article 12 does not limit jurisdiction to children who reside in a Member State – first, the term "third state" in other parts of the Regulation refers to a non-Member State, second, the clear wording of the Practice Guide[275] and third, the other references of the ECJ to the term “third state”. As the child's parents were habitually resident in the UK they and the child were British citizens and jurisdiction had been accepted by the parties under 12.3(b) before and after the start of the proceedings, the general requirements of Article 12.3 (b) were fulfilled.

Article 12(4) states the circumstances under which a court in a Member State has jurisdiction over a case in which the child habitually resident in a third state that is not a contracting State to the Convention on Child Protection is in the child’s best interest. *I* (A Child) suggests that parents may decide to litigate in the courts of a Member State though their children are habitually resident outside the EU, provided that the requirements set forth in Article 12 are satisfied.[276] This is clearly an important decision on the application of Brussels II

[274] *Re I, supra* note 276.
[275] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 3.2.6.2.3, “Article 12(4) specifies that jurisdiction under Article 12 shall be deemed to be in the “child’s best interest” when the child in question is habitually resident in a third State which is not a contracting State to the 1996 Hague Convention on Child Protection (35), in particular if it is found impossible to hold proceedings in the third State in question”.
[276] Re I (A Child), [2009] UKSC 10 [2010] 1 FLR 361.

bis with regard to states which are not contracting parties. The potential for litigation seems vast and will be discussed in the chapter on the interaction in connection with Article 61, which concerns the relationship between the Regulation and the Convention on Child Protection. As has been seen in this chapter, divorce proceedings under the Regulation may well have an influence on parental responsibility proceedings and hence may well influence the interests of the children concerned. On the positive side Article 12 allows for the divorce court to hear the parental responsibility case only if the link between the parental responsibility case and the divorce court are sufficiently strong. On the negative side, several courts could be seised simultaneously of a dispute over parental responsibility since the jurisdictional grounds pursuant to Article 12 are not exclusive grounds so that the court in the Member State of the habitual residence maintains jurisdiction. Article 19, the adoption of the *lis pendens* mechanism in the Regulation, deals with this situation. Hence, if the child is habitually resident in a Member State, the Regulation prevails and the jurisdiction of the divorce court with regard to parental responsibility will be determined pursuant to Article 12 of the Regulation. Additionally, if the child is habitually resident in a non-Member State which is not contracting state to the Convention on Child Protection there will be jurisdiction of the divorce court over parental responsibility pursuant to Article 12 of the Regulation. The consideration of the “superior”, as discussed above the best interests of the child allow for some judicial discretion and when such would be declined, If the court has jurisdiction and at least one of the parents is the holder of parental responsibility and if all the holders have agreed on the jurisdiction of the court, cases where such jurisdiction is not in the best interest may be considered rare. However, with its utmost priority on the best interest, the Regulation allows for such a consideration by the court. As the content of Article 12(2) (b) is drafted rather ambiguously and could be misunderstood when the court seised only of the parental responsibility has reached a final decision. If proceedings on parental responsibility are pending before the State where the child is habitually resident and will additionally be commenced before the courts of the State where the divorce proceedings take place, this is a clear disadvantage. Article 12 (2) (b) could be misunderstood as meaning that the court seised of the divorce could lose jurisdiction when the court seised of the parental responsibility has reached a final decision.

Article 12(3) has been already been analysed critically in the context of the chapter on the prorogation of jurisdiction.

It has been described that three conditions are required in order to confer jurisdiction: a substantial connection between the child and the court seised, the agreement of the parties to the proceedings and the consideration of the best interests of the child. Such limited party autonomy and possibility of choice is quite exceptional for jurisdictional purposes but it is very similar to the approach of the Commission later taken with respect to choice of courts for divorce proposed in the Proposal on applicable law and jurisdiction in matrimonial matters[277]. The approach taken in Article 12(3) is quite fuzzy. Whilst the requirement that the child has a "substantial connection" with the State of the court seised is explained in examples of these substantial connections: habitual residence of one of the holders of parental responsibility or nationality of the child, the courts could establish any other connection. It seems that one must wait for more leading case law before knowing exactly the impact of the provision and of the 'substantial connection'; in the meantime, the discretion causes legal uncertainty.

The additional condition of the best interest is a qualifier on the one hand, as in Article 12 (1). On the other hand, generally, an extension of the divorce jurisdiction to parental responsibility seems a reasonable objective, and the application of judicial discretion to refuse to hear the case based upon the best interests of the child seems unlikely. Hence, the concept of the provision is generally laudable.

V. Forum non-conveniens

In the Convention on Child Protection, Articles 8 and 9 contain a 'reversible mechanism' for *forum non conveniens* and *forum conveniens*[278], when it would

[277] European Commission, Green book on applicable law and jurisdiction in divorce matters, *supra* note 268.
[278] Explanatory Report, *supra* note 104, p.559.

be in the child's best interest that the case is dealt with by authorities other than those of the State of the habitual residence.

In the jurisdiction chapter of the Regulation, as the above analysis made clear, the *forum non-conveniens* mechanism has been avoided strictly by the drafters of the Regulation. All grounds of jurisdiction are hierarchically ordered grounds of jurisdiction and their functioning is dependent to considerable extent on mutual trust between the courts of the Member States. The limited plurality of bases for jurisdiction adds some of flexibility. However, with Article 12(3), there is a provision for judicial discretion, therefore, it is also guaranteed that the court will determine that it is not ill-placed for deciding over parental responsibility. Moreover, it can be argued that this criterion of best interests of the child establishes a relation between Article 12 (3) and Article 15. A court could refuse to hear the case on the basis of arguing that this would interfere with the best interests of the child, suggesting that the holders of parental responsibility should seise the normally competent court.

In this context of the Regulation it therefore seems that the judicial discretion provided by the evaluation of the best interests of the child is a positive asset. Of course, as always, when it comes to judicial discretion, the assessment of the practical effects of the provision will depend on national case law.

The introduction of Article 15 into Brussels II *bis*, and hence the introduction of a form of *forum non conveniens* is a clear indication that the European legislator was prepared to include provisions combining the civil and the common law approach to jurisdiction. While this provision is described as an 'innovative' rule in the Practice Guide, it is in fact similarly included in the Convention on Child Protection, in particular in Article 8. Interestingly, the provisions in the Regulation which are based on the *forum non-conveniens* idea refer to the best interest principle.

C. Conclusion

Chapter 2 has analysed the provisions on jurisdiction, in view of the main concepts established by the ECJ during almost one decade with an emphasis on the connecting factor 'habitual residence' and the suitability of the concepts included in those provisions for parental responsibility and custody cases. In the

context of those rules it has been assessed whether the rules encourage national courts to have regard to the 'best interests' of the child.

By bringing up a new approach to the concept of 'habitual residence' the Regulation has, in the context of those provisions, promoted legal certainty in comparison to the discretion under the case-law of the Convention on Child Abduction.

The second part of this chapter, Chapter 2 B, has also assessed the ECJ case-law in the context of return orders, in relation to provisional measures, and return orders will more thoroughly analysed per se in Chapter 4, as the interrelation with the Convention on Child Abduction is most inherent to the provisions on return orders. This is because of the complementary nature of the rules.

In the context of the provisions on divorce proceedings in the Regulation it has become clear how significant the interlink between the place of jurisdiction of divorce proceedings and the place of jurisdiction for the proceedings regarding parental responsibility is.

Besides the set of rules on jurisdiction, the rules on provisional measures are a cornerstone of the Regulation. As the analysis in this chapter has demonstrated the judgments in *Purrucker I* and *Purrucker II* reflect the ECJs´ confidence in the proper functioning of mutual trust and cooperation between the Member States. Main proceedings are supposed to remain unaffected, according to the court in Purrucker[279] Deticek has also confirmed the interim nature of provisional measures.[280] The significance of Purrucker and Deticek has become evident and discussed in the section on provisional measures and in the general assessment.

The Regulation itself and the ECJ's ruling on provisional measures have been very progressive and adaptive to the fast movements of parents and their children within the Union's borders and beyond. There is, however, still

[279] *Purrucker I*, *supra* note 215; *Purrucker II*, *supra* note 213.
[280] Wright, M., 'Urgent Provisional Measures under Article 20 of Brussels II *bis* vs Principles of Comity' 2012 IFL, Feature.

uncertainty caused by the (mis)interpretation by the national courts[281] of the Regulation's rules on provisional measures. This again is often directly linked to the interrelation of the Regulation and the Convention with regard to the recognition of those measures and orders under one instrument in courts proceedings under the other instrument. This issue will have to assessed again in the context of the interrelation in Chapters 3 and 4.

Another significant concept analysed in this Chapter was Article 12. As a noticeable exception to the general rule, pursuant to which the courts of the habitual residence of the child have jurisdiction, the jurisdictional grounds pursuant to Article 12 are not exclusive so that the courts of the state of the habitual residence of the child are not deprived of jurisdiction but only under the circumstances referred to in Article 12.

In this chapter of this thesis it was further analysed how the wording "better placed" is used in the framework of the provisions and has hitherto been interpreted in the context of the Regulation, and that, whilst the significance of the concept of habitual residence has become clear in combination with "best interest" there is no reliable guidance as to what "better placed" shall mean.

At this stage it has become clear, that a stand-alone evaluation of the provisions on jurisdiction and provisional measures only allows for a limited evaluation of the advantages and disadvantages. But this analysis sets the ground for an analysis of the interrelation of the Regulation with the Convention on Child Abduction, and in the second part, the Convention on Child Protection, which will be undertaken in the following Chapter. The guidance provided by the numerous ECJ decisions strengthens the Regulation by introducing continuity and certainty of definitions and in the following chapter it will be assessed if this still holds true in the interaction with the Convention on Child Abduction. In the next chapter it will be considered if the Regulation weakens the functioning of the Convention and inhibits its application.

[281] *Povse v Alpago, supra* note 244.

Chapter 3 The relation of and interaction between Brussels II *bis* and the Hague Conventions on Child Abduction and Child Protection

Based on the analysis of the structure and concept of the provisions in the Regulation and the interpretation of the central terms, this Chapter will analyse the various aspects of interrelation of the Regulation with the Convention on Child Abduction, and in the second part, the Convention on Child Protection.

A. Relation of and interaction between Brussels II *bis* and the Hague Convention on Child Abduction

The following parts of the analysis will cover the rules directly addressing the interrelation between the Convention on Child Abduction and the Regulation beyond this scope, the rules which are relevant for the interrelation. It will consider the additional layer of rules in the Regulation relating to child abduction and both return and non-return situations and will assess the influence of the ECJ's decisions on the interpretation of such interrelation, thereby showing whether the Regulation – and its application – take the right direction to meet the ambitious aim of respecting the best interests of the child. Furthermore it will consider the change brought about by the additional layer of rules to the concepts of interpretation developed in an immense body of case law on the Convention on Child Abduction. The chapter will in this context also address difficulties in the Convention on Child Abduction which the Regulation tries to overcome, in the interest of fast and fair proceedings. Further, the concept of hearing the child in the Regulation and the Conventions will be analysed.

I. The necessity of appraising the Conventions when considering Brussels II *bis*

Though the ECJ has meanwhile given some guidelines on the interpretation of the term habitual residence in Brussels II *bis*[282] in different contexts, the need for an autonomous interpretation under the Regulation[283] is a two-edged sword – it will need to be seen whether the ECJ and the courts in the Member States are content to rely on their own concepts established by the case-law on the Hague Conventions and disregard or respect the cases dealt with by the ECJ during the last years. Heretofore the following analysis of the relation of and interaction between the provisions on jurisdiction and enforcement and recognition in Brussels II *bis* and the Hague Convention on Child Abduction will show the difficulties of an interrelation of a well-established legal instrument with the independent EC community body of jurisdictional rules.

In order to discuss the interaction of the respective rules on jurisdiction in the Hague Conventions on Child Abduction and Child Protection with Brussels II *bis* and to outline difficulties and to discuss solutions which have hitherto been proposed, a short consideration of the rules on jurisdiction in those Conventions is required.

II. Jurisdiction in the Hague Convention on Child Abduction

As the object of the Convention is to ensure that children are returned promptly to the country of their habitual residence - assuming that the child's habitual residence is the most beneficial residence - it is for the court of this country to decide on custody matters, Article 1(a).[284] The whole concept of action in a

[282] See the above cases *Rinau*, *supra* note 19, *Proceedings brought by A*, *supra* note 17; *Sundelind Lopez, supra* note34; in *M v M*, the English court held that a person could only have one habitual residence at a given time in accordance with the terms of Article 3(1)(a) and confirmed the concept of habitual residence to have an autonomous meaning in Community law: *M v M,* Court of Appeal - Family Division [2005] EWHC 2769 (Fam).

[283] thereby denying to adopt the approach issued in Case C-76/76, *Di Paolo v Office National de l'Emploi* [1977] E.C.R. 315 ECJ; Case C-102/91, *Knoch v Bundesanstalt fuer Arbeit* [1992] E.C.R. I-4341 ECJ) and Case C-90/97 *Swaddling v Adjudication Officer* [1999] All E.R. (EC) 217 ECJ.

[284] Clarkson C., Hill J., *supra* note 234, p.399.

situation of wrongful removal or retention in the Convention is based on the habitual residence of the child before such removal or retention. Not only applies the Convention to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights, but also, pursuant to Article 15 the authorities of the contracting state to which the child was removed may request from the authorities of the State of habitual residence "a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention". Whilst this concept builds on the return of the child to the state of the former habitual residence, the authorities of the contracting state in which the child is present is responsible for initiating the return of the child. The Convention, as contrary to the Regulation, does not define the legal concepts used by it.[285]

1. Habitual residence – a disputed concept in Convention cases

Hence, when drafting the Convention, the Hague Conference avoided a comprehensive definition of 'habitual residence', based on the assumption that it is an "well-established concept" and a "question of pure fact".[286] Pursuant to the Explanatory Report[287] "the rules of the Convention rest largely upon the underlying idea that there exists a type of jurisdiction which by its nature belongs to the courts of a child's habitual residence in cases involving its custody". Hence, as will be explored in the following, due to the considerable degree of discretion, different approaches in different jurisdictions have characterized the case-law. Silberman comments that

"*several of the concepts enumerated above are unique to this Convention and have spawned judicial interpretations regarding their meaning*"

and harshly notes that a

[285] Perez-Vera, E., Explanatory Report on the 1980 Hague Child Abduction Convention, Offprint from the *Acts and Documents of the Fourteenth Session (1980)*, volume III, *Child abduction,* The Hague 1982.
[286] ibid.
[287] ibid.

"*failure to acquire a consistent interpretation of the treaty will undermine its value as a vehicle for ensuring the return of children wrongfully removed or retained in the international setting*."[288]

This evaluation, provided back in 1994 has proven true. Though, certainly, the application of the concept should take regard of the Convention's objectives, as stated in the Preamble and in Article 1, many courts have departed from purely considering those objectives - a prominent example being the US Court of Appeals which held that the concept of habitual residence with regard to the Convention is one of both law and fact, hence allowing for appellate review.[289]

2. The interpretation in the case law under the Convention

English courts regularly connect the concept with the central requirement of a certain period of presence.[290] Interpretations have deviated considerably over the years. The approach focusing on the intent of the parents, according to which the habitual residence of the child is dependent on the habitual residence of the parents, does not appear to be consistent with the objective stated in the *Perez* Report[291] that habitual residence is intended to be a factual concept. An approach referring to the child's and the parents' situation rather than solely the parents' situation was chosen in the US Court of Appeals decision in *Friederich,* a case which will be discussed in more detail in this Chapter 3 II in subsection 3 on the approach of the US courts.[292] This approach accords with the objectives expressed in Article 1 and the Preamble of the Convention and was followed in

[288] Silberman, L., Hague International Abduction Convention: A Progress Report available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4246&context=lcp, last accessed 02 May 2016.
[289] *Edward M. Feder, Appellant, v Melissa Ann Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth the basic rules of treaty interpretation. The most fundamental rule is set forth in Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose." Other provisions of Article 31 provide a specific definition of "context" and additional related guidance.
[290] *V v B* (A Minor) (Abduction) [1991] 1 FLR 266; *Re F* (A Minor) (Child Abduction), *supra* note 144.
[291] Perez-Vera, E., Explanatory Report, *supra* note 285.
[292] *Friedrich v Friedrich supra* note 20.

some US federal cases,[293] as will be discussed in detail in Chapter 3 II 3 which succeeds this subchapter. A “flexible interpretation” was called for in the Explanatory Report[294] and clearly, the text of the Convention allows for such interpretation with the restriction that the determination of the habitual residence in the context of the Convention must be in accordance with the objective set forth in the Preamble. The Explanatory Report underlines – with a very general wording- that the “struggle” against child abduction must be “inspired by the desire to protect children and should be based upon an interpretation of their true interests.” It does not refer directly to the Preamble, which would seem an obligatory consideration in the interpretation of the Convention as an international treaty. Whilst the binding character of a Preamble has regularly been disputed,[295] the interpretative value of the Preamble of an international convention is beyond question as Article 31 of the Vienna Convention on the Law of Treaties[296] states that

"[t]he context for the purpose of the interpretation of a treaty shall [include] the text, including its preamble and annexes"

and has been respected more frequently during the last years.[297] However, since there is also no reference to the (best) interests of the child in the dispositive part of the Convention, a direct reference to the interests of children in determining the habitual residence is also not at hand. Hence, whilst the Convention’s structure is built on the existence of and return to a habitual residence of the child there is no definition or guideline to the interpretation and in absence of both the national authorities have been deemed to accept that it is a “well-established concept of the Hague Conference”.

Recently, the Permanent Bureau of the Hague Conference on Private International Law supported the petition in the U.S. Supreme Court case of

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[293] *Slagenweit v Slagenweit* (1993) 841 F Supp 264; *Mozes v Mozes* (1998) 19 F Supp 2d 1108
[294] Borras Report, *supra* note 29.
[295] Quoc Dinh N., Daillier P., Pellet A.: *Droit International Public* (7th edition), L.G.D.J., Paris, 2002, p. 131.
[296] Fitzmaurice, M., Elias, O. and Merkouris, P., eds. *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*. Leiden 2010.
[297] ibid.

Abbott[298] with an amicus brief[299] and the petition in this case is a concise interpretation of the Convention's objectives with regard to jurisdiction. Dealing with whether a *ne exeat* clause[300] confers a "right of custody" within the meaning of the Hague Convention on Child Abduction, it held that the Convention's text, "particularly when considered in light of its animating goals and purposes, as well as its drafting history, demonstrate[*s*] that a *ne exeat* clause does in fact constitute a "right of custody" within the meaning of the Convention."[301] It states that - though the Convention does not provide a definition of "rights of custody," - Article 5 points to the fact that "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." are meant to be incorporated. It further states that the Convention differentiates "rights of custody" from "rights of access," for which the remedy of return is not available. Referring to the *Explanatory Report*, it continues that considering a *ne exeat* clause a right to determine a child's residence, and therefore a "right of custody" further accords with the cornerstone aim of the Convention to protect "all the ways in which custody of children can be exercised" through "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."[302] This is a recent example for a concrete approach to interpreting a concept of the Convention and clarifying a specific question with respect to such interpretation. A central authority of the contracting state in which the child is present or has been abducted has to initiate the return of the child to the former habitual residence of the child – but where is this habitual residence? And does it have to consider other conventions or even the case-

[298] *Abbott v Abbott*, 17 December 2008, Brief amicus curiae of the Permanent Bureau of the Hague Conference on Private International Law, available at http://www.scotusblog.com/wp-content/uploads/2008/12/abbott-amicus-brief.pdf; last accessed 01 May 2016.
[299] There was also a Brief of the United States as Amicus Curiae Supporting Petitioner at 21 n.13, *Abbott v Abbott*, No. 80-45, available at https://law.ucdavis.edu/faculty/bruch/files/AbbottProf%20Brief.pdf, last accessed 01 May 2016.
[300] ibid: "that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent".
[301] *Abbott v Abbott*, 560 U.S. (2010), No. 08-645, Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, p.25, available at http://www.scotusblog.com/wp-content/uploads/2008/11/abbott-petition-final.pdf, last accessed 01 May 2016.
[302] ibid, p.37.

law regarding such other conventions to apply the term as intended by the drafters of the Convention in accordance with the Explanatory Report? A concrete, clarifying approach as in Abbott has not been taken during the past thirty-five years.

The Hague Conference has continued its practice of leaving the interpretation of the term 'habitual residence' to the courts and central authorities. The courts and central authorities have been left with a considerable degree of flexibility and the case-law in the different jurisdictions reveals different approaches. Some courts consider the habitual residence of the child as dependent on the residence of the parents, others determine the child's habitual residence independently or at least more independently based on the child's intent or situation.[303] It is assumed that the abducted child's interests can best be protected by litigation in the *forum conveniens*, which usually is the place of the child's habitual residence, however, the terms interests or best interests are intentionally not used in the dispositive part of the Convention.[304] Whilst this view is not disputed and still as up-to-date as in 1980 when Professor Perez-Vera commented on it,[305] the concept has undergone considerable change during the last decades. According to de Winter the main reason for the acceptance of the concept of habitual residence at The Hague was the recognised need to avoid a continuation of the nationality principle and the difficulties of the concept of domicile in child custody cases.[306]

Before being used in the Convention on Child Abduction, habitual residence was used as the main connecting factor in a number of Hague Conventions

[303] Parental related: *Mozes v Mozes*, 39 F.3d 1067, 1069 (9th Cir. 2001); *Holder v Holder*, 392 F.3d 1009 (9th Cir 2004); *Tsarbopoulos v Tsarbopoulos*, 176 F. Supp.2d 1045; Combined Child´s Connection/Parental Intention Focus: *Feder v Evans-Feder, supra* note 289; Child Centred: *Robert v Tesson*, 507 F.3d 981 (6th Cir. 2007); *Friedrich v. Friedrich, supra* note 20.
[304] Perez-Vera, E., Explanatory Report *supra* note 285, at para 66.
[305] ibid.
[306] de Winter, L., *Nationality or Domicile?*, Leiden 1969, 3 Receuil des Cours 349, pp. 419 et seq.

relating to children[307], first in the Hague Convention on Guardianship of 1902.[308] The inability of the 1961 Convention to satisfactorily handle kidnapping cases may have been one of the factors responsible for the initiative to draw up the Convention on Child Abduction. As the Convention refers to the date before the abduction with regard to the determination of habitual residence, it sets a clear guideline as regards the point of time. In England and Wales, habitual residence was first adopted in the legislation implementing international conventions and is now referred to in the Family Act.[309] During the decades of case-law on the Convention, the main approach has been to consider the settled intention of those holding custody rights in conjunction with the factual reality of the child's life.[310]Though the case-law on child custody has had considerable influence on the development of habitual residence as a connecting factor in the national jurisdictions during the last decades, the national interpretations under the Convention differed immensely. Whilst the balance between the interests of one parent or both parents and their children has been recognised as important[311],

[307] Convention of 24 October 1956 on the law applicable to maintenance obligations towards children, Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; Convention of 15 November 1965 on Jurisdiction.

[308] Hague Convention of 1902 relating to the settlement of guardianship of minors, https://www.hcch.net/de/instruments/the-old-conventions/1902-guardianship-convention, last accessed 02 May 2016.

[309] Chapter II of the Family Law Act 1986.

[310] Schuz, R. 'Habitual Residence of Children under the Hague Child Abduction Convention: Theory and Practice' (2001) Child and Family Law Quarterly Vol 13, No. 1, 1.

[311] Conclusions and Recommendations of the fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006) "It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings."; In The Fourth Special Commission Meeting to review the practical operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Conclusion 3.8, the Commission recognised that: "[t]here are considerable differences of approach to the question of interviewing the child concerned…" but referred to the method rather than the necessity to consider the view of the child; In the Draft Additional Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, submitted by the Swiss delegation it was requested to add to the Convention that "The Central Authority or the judicial or administrative authority of the requested State shall hear the child in an appropriate manner or arrange for a qualified person to do so, unless this appears inappropriate in view of the child's age or degree of maturity." available at http://www.hcch.net/upload/wop/abductprot_ch_e.pdf, last accessed 01 May 2016.

in the courts the consideration of child's intentions has had a limited scope. In *DT v LBT*[312] the court stated that the issue for a court hearing a summons under the Convention was not what was the best for the child but who should decide what the best for the child is. The court clarified that the decision should be taken in the state of habitual residence. The interesting part of the case – besides the consideration of the grave risk and *Neulinger* which will be considered later- is the determination of habitual residence by the court. The court explicitly stated that it was "concerned" with regard to the determination of the habitual residence.

However, the dispute does in most cases not merely concern the removal or retention of a child but also the situation as it existed at the child's original residence. In the above case the court continued that

"a broad overview of the child's circumstances and best interests [is] relevant when determining whether one of the exceptions in fact applies, and if it does, what consequences should follow."[313]

Hence, despite the Explanatory Report's restrictions to considering the best interests, the High Court in this case stated that a broad overview of the child's circumstances and best interests was necessary and recognised that the habitual residence was difficult to determine. The mother had argued that she had been bullied into agreeing to move with the children to live with the father in Italy. In conclusion the judge considered that the period as a whole amounted to habitual residence of the children. In this case the removal was deemed wrongful but the return refused since Article 13(b) had been proved to the standard required under the Convention.

Though in cases under the Convention it was not disputed in the English courts that unilateral action does not lead to a change in the habitual residence of the child if the other parent is vested with parental rights[314], the English courts have more recently held that an abducted child may eventually become habitually

[312] *DT v LBT*, [2010] EWHC 3177 (Fam).
[313] ibid.
[314] *Re M* (Abduction: Habitual Residence), [1996] 1 FLR 887.

resident in the State to which he or she was abducted.[315] This is one of the close connections of the case law under the Convention to the case-law under Brussels II *bis.* Whilst there are many cases in which it is rather clear in which country a child is habitually resident, one or two countries may be relevant in other cases. Parental intention is a significant factor to be determined through documentary evidence if such evidence is available and the Inner House of the Court of Session[316] has adopted a very strict interpretation of what was agreed by the parents formally rather than what may have been the intention.

One of the judicial interpretations widely adopted in cases regarding the Convention is the *Shah*[317] case. Although this case was not related to child custody, the definition which has emerged from it has been referred to by courts in many countries, in particular as regards the meaning of the term "ordinary residence". It was defined in *Shah* by Lord Scarman:

"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."[318]

How has the Convention approach been challenged? One should assume that it has been replaced by the European approach to the extent only Member States are concerned (Article 60 lit e) of the Regulation). However, there is a tendency on the part of English judges to resist adopting the approach of the ECJ. Recently, in *Re H-K*[319], the Court of Appeal expressed its unwillingness to establish habitual residence in accordance with the language of the European

[315] *Re C* (A Child) (Residence and Contact) [2005] EWHC 2205 (Fam), [2006] 2 FLR 277; *Re D* (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619, at para [4]; see also Article 10, Brussels II *bis.*

[316] In J, Petitioner [2005] CSIH 36, 2005 GWD 15-251 the Inner House of the Court of Session held that 'rights of custody' meant the right to grant or withhold consent to the child's removal; *Cameron v Camero, supra* note 144.

[317] *Reg v Barnet LBC, ex parte Shah* [1983] 2 AC 309.

[318] ibid.

[319] *Re H-K* (Children) [2011] EWCA Civ 1100.

Court in *Mercredi v Chaffe*.[320] In *Re H-K*[321], the contesting states were Australia and the UK. Though his Lordship Ward respected that

"the European meaning of habitual residence will, by osmosis, shape the autonomous meaning to be given to that phrase in the International Hague Convention on Child Abduction with the stress on its international application"[322]

he argued that the appropriate approach in the case was to be drawn from *Shah* (*Reg v Barnet LBC)*.[323]

There are only few cases under the Convention in which it is explicitly stated that the habitual residence of a child is dependent on that of his/her parents - these tend to be in cases in which the habitual residence of the child was assumed to be different at all from that of the parents or in cases where the parents did not have a common habitual residence.[324]

In the early case of *Re J*, Lord Brandon held:

"Where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers."

and continued:

"In the ordinary case of a married couple, in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction wrongfully and in breach of the other parent's rights."[325]

Whilst this approach which links the child's habitual residence to the habitual residence determined by the parent holding parental rights, has been followed in other decisions[326], some Judges began to utter doubts that parental intention

[320] *Mercredi v Chaffe, supra* note 130.
[321] ibid.
[322] Re H-K, supra note 319, at para 17.
[323] ibid.
[324] It has been avoided for being inappropriate and rewarding the abductor in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, p. 578.
[325] ibid.
[326] *Re M, supra* note 314.

should be allowed to prevail over factual considerations.[327] It is accepted that the focus on the requirement of joint as opposed to unilateral decision-making seeks to give effect to the policy of preventing any abduction but that an extended period of time in the country of refuge may suffice for an abducted child to eventually become habitually resident there[328]. To a certain extent this approach has been adopted by Article 10 of Brussels II *bis*. Where evidence of a shared intention could not be assumed to have existed at the outset of a re-location, but residence nonetheless endures, some courts have assumed the acquisition of a new habitual residence.[329]

In the more recent High Court case of *Re H and L*[330] the court focused on settlement without giving much emphasis to the parents' situation. It held that the decisive issue was that of the settlement of the child and that settlement under Article 12 of the Hague Convention required wider considerations than simply the physical whereabouts of the child, in this regard referring to the fact-specific approach emphasised by Baroness Hale in *Re M*.[331] As the judge considered the parents' evidence to be unsatisfactory, the guardian's evidence that the children were settled in London was accepted in its entirety.[332] Article 12 refers to settlement of the child in the new environment and releases the authorities of the state of the former habitual residence from ordering the return if "it is demonstrated that the child is now settled in its new environment." If disputed whether a settlement has occurred or not, this defence places the burden of determining whether a child is settled or not in the new environment on the court. In *Re H and L* the court referred to the "broad meaning of settlement, encompassing not only physical but also emotional and psychological security and stability.[333] This accords with the Explanatory Report's approach that proving such settlement is "a task [as] falling upon the

[327] Beaumont, P. and McEleavy, P., *Anton's Private International Law*, Green, 3rd edn, 2011.
[328] *Re C, supra* note 315; *Re D* (A Child), *supra* note 315, para 4.
[329] *Re A*, *supra* note 180; *Re S* (A Minor) (Abduction) [1991] 2 FLR 1.
[330] *Re H and L* [2010] EWHC 652 (Fam).
[331] *Re M & Anor* (Abduction: Zimbabwe) [2007] UKHL 55, [2008] 1 FLR 251, at [47-48].
[332] *supra note* 330.
[333] ibid; see *Re N, supra* note 20 per Bracewell J at 418 and *Re M* (Abduction: Acquiescence) [1996] 1 FLR 315 per Thorpe LJ at 321.

abductor or upon the person who opposes the return of the child". It suggests that this safeguards the "contingent discretionary power of internal authorities in this regard".

On the other hand, there have been interpretations of habitual residence more similar to the Regulation. In the early High Court case of *Re Bates*[334] the court had already considered the meaning of the term 'habitual residence' in the context of the facts of the particular case, an approach with regard to continuity of residence similar to the ECJ's approach in *Proceedings brought by A*.[335]

The alleged habitual residence of New York was not the only place where the child had resided and it was not certain that New York would be the permanent residence of the child. The court held that the child was habitually resident in New York State at the time of her abduction though she had not been there for a long period of time and would not, in any case, remain indefinitely, arguing that a sufficient degree of continuity in the residence had been reached.

3. Deviating path? - the approach in the U.S. courts

In the U.S. courts the development of the main approaches to the concept of habitual residence was different. In the U.S. Court of Appeals decision in *Friedrich*[336] the case of a U.S. servicewoman, who lived in Germany with her German husband who was the father of the child and the applicant claimed that the child became habitually resident in the U.S. as she had to move to a US army base. Justice Boggs held:

"[H]abitual residence pertains to customary residence prior to the removal. The Court must look back in time, not forward. All of the factors listed by Mrs Friederich pertain to the future. Moreover, they reflect the intentions of Mrs Friederich; it is the habitual residence of the child that must be determined."[337]

Further on it was stated:

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[334] *Re Bates*, supra note 20.
[335] *supra note* 17.
[336] *Friedrich v Friedrich*, *supra* note 20.
[337] ibid, part III A.

"[H]abitual residence can be "altered" only by change in geography and the passage of time, not by changes in parental affection and responsibility."[338]

Whilst McClean[339] harshly criticised the decision, stating that it "is a striking example of how not to handle Convention cases", the analysis of the child's situation seems more in accordance with the growing significance of international conventions and statutes calling to respect the best interests of the child[340] than an approach based on the parents' intent and situation. On the other hand, the Convention on Child Abduction is an autonomous instrument and the emphasis which has lately been laid on respecting the child's interests cannot be conveyed; the discretion the wording offers means that there is no certainty that a judge will determine whether or not a return should be denied because of a settlement or whether or not a child has been habitually resident in a different contracting state.

Though the approach in *Friederich*[341] and *Feder*[342] has been repeatedly and recently referred to in the US courts[343], the courts have not developed guidelines with regard to particular objective factors and have not drawn a clear line between cases requiring the consideration of the child's connection and the parental intentions and those only requiring a focus on the child.

In *Mozes*, again a case often referred to in subsequent decisions[344], the court focused on the standard of parental intent and denied to consider aspects

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[338] ibid, part III A.
[339] McClean, D., 'International Child Abduction - Some Recent Trends' (1997) CFLQ, 387.
[340] Tobin, J., 'Judging the judges: Are They adopting the rights approach in matters involving children?' (2009) MelbULawRw 20, available at http://www.austlii.edu.au/au/journals/MelbULawRw/2009/20.html, last accessed 02 May 2016.
[341] *Friedrich v Friedrich supra* note 20.
[342] In *Feder v Evans-Feder, supra* note 289, the Third circuit held that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective.
[343] Recently in *Robert v Tesson*, *supra* note 303; *Zuker v Andrews* (1998) 2 F Supp 2d 134, in *Slagenweit v Slagenweit, supra* note 293, the court held that a three-year-old girl who had been living with her father in Iowa for over a year was habitually resident because of "her substantial involvement with her father, his girlfriend […] and the Iowa medical community", thereby referring to the treatment being received for epilepsy; in *Silverman v Silverman*, 338 F.3d 886 (8th Cir. 2003) and *Karkkainen v Kovalchuk*, 445 F.3d 280 (3rd Cir. 2006), the courts followed *Feder v Evans-Feder, supra* note 289.
[344] *Robert v Tesson*, *ibid; Murphy v Sloan* 764 F.3d 1144 (9th Cir. 2014).

related to the situation of the child and marked them "superficial."[345] The court stated that the concept of habitual residence had to be applied in an intelligent and consistent manner so that parents would know in what circumstances their child's habitual residence would change.[346] Despite the significance of decisions focusing on the settlement of the child, parental intention has remained an important factor in US federal cases decided under the Convention. This not only in cases in which the courts correctly assumed the child not capable of having any relevant intentions due to young age and stated that the parents' intentions had to be considered instead.[347] Hence, prior to *Abbott*[348], which is not as much a novelty with regard to the concept of habitual residence as some think, three major approaches could be found in the US courts: *Mozes* (emphasis on parental intent); *Feder* (consideration of parental intent and child's acclimatisation); *Friedrich* (factual circumstances, past experience of the child). *Redmond* was a combination of the Ninth Circuit's interpretation in *Mozes* and the case law established in the Seventh Circuit – in this case the court decided to determine habitual residence in accordance with its plain and ordinary meaning.[349] It recognised that only once the court determines habitual residence the issue of custody rights be discussed, and that usually this will take place in a court in the state of the child's habitual residence.

This 'mixed' approach means taking a variety of factors into account, including the time spent in the specific state and everyday activities, to determine that this was a permanent home.

Whether due to a lack of concrete guidance or due to a rejection of the approach in *Friedrich*, the courts for years continued to rely on the 'settled purpose' test, treating the habitual residence of the child as somehow

[345] *Mozes v Mozes*, *supra* note 303.

[346] ibid at 1074 (child's habitual residence is where the parents jointly intend to raise child and where child actually lives).

[347] In *Morris v Morris* 55 F Supp 2d 1156 the Judge argued that a two-year-old child was "unable to meaningfully and independently express his feelings regarding his habitual residence and has not capacity to determine such status. In such a case I must consider the overtly-stated intentions and conduct of his parents in order to determine whether they formed the necessary "degree of settled purpose that is required for a habitual residence".

[348] *Abbott v Abbott,* s*upra* note 301.

[349] *Redmond* 724 F.3d 729 (7th Cir. 2013).

dependent on the residence of the parents. Though it was recognised that the child's daily life must be affected by the intentions and situation of the parents, it is difficult to determine which facts were considered of greatest significance. The time spent in and the connection between the children and a certain state have been considered in different ways. Whilst in *Mozes*[350] the emphasis was on the connection between the children and California, where they had spent the past year, in *Feder*[351] the District Court emphasised that the children had spent most of their lives in the US whilst the Appeal Court laid emphasis on the quality of the last six months which had been spent in Australia. An obligation to order that a child be returned to another country would regularly run counter to the national judges' tendency to directly address the underlying substantive issues and consider the child's individual best interests. Hence, Article 16 of the Convention on Child Abduction prohibits a court which has been notified of a wrongful removal or retention from deciding a custody dispute until it has been determined that the child shall not be returned. Further, under Article 17, the fact that a custody decision has been made in the requested state is not considered a proper ground for refusing the child's return.

In the U.S., *Isaac v Rice* was an example of re-abduction back to the country of origin and of the question of habitual residence after a considerable period of time.[352] Referring to *Mozes*[353], the court held that the child had not become habitually resident in Israel where it had lived for a period of 11 years after having being abducted by the father as the mother did not *intend* the child to live there.[354]

In the view of the court in *Isaac v Rice*, it would be:

"a technical and restrictive reading of the "habitual residence" requirement for a court always to look solely at a child's perspective regarding a country, much

[350] *Mozes v Mozes*, *supra* note 303.
[351] *Feder v Evans-Feder, supra* note 289.
[352] *Isaac v Rice*, 1998 WL 527107 (N. D. Miss.).
[353] *Mozes v Mozes*, *supra* note 303.
[354] In *Meredith v Meredith* 759 F Supp 1432, the court argued that it would be 'inequitable and unjust to allow such conduct to create "habitual residence" for the child'.

less the number of years the child spends in that country in determining the child's habitual residence."[355]

Whilst Schuz[356] criticises that the question of the child's intention has not been taken into account in many cases in which the U.S. courts have adopted what she terms the "parental-rights approach", the U.S. pioneered the approach of considering factual circumstances and past experience of the child. The wording of the Convention leaves no doubts that the wishes of children who are sufficiently mature to understand the implications of their decision will override the requirement of mandatory return.[357]

Hence, under a child-centred approach, the intention of a child who is sufficiently old and mature to have an intention must be considered relevant, and it is for the courts to consider this intention in the context of the circumstances of the case.

It remains to be seen if the growing significance of children's rights in national jurisdictions, which calls for an approach considering the child's intentions and interests,[358] will now reach the courts to replace the more traditional approaches to habitual residence in the context of the Convention on Child Abduction in the U.S. The signature of the Convention on Child Protection by the United States is considerable step forward, but as of now, the Convention has not been ratified.[359] As will be considered later with regard to the interaction of the Convention on Child Abduction and the Regulation and cases regarding both the United States and the EU, a clearer definition of the requirements for the acquisition of habitual residence is a central if not the central aspect in the framework of the interaction of the Convention and the Regulation and jurisdiction, return orders and the enforcement of orders in accordance with the rules of the Convention and the Regulation.

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[355] *Isaac v Rice, supra* note 352, p.21.
[356] Schuz, R., 'The Hague Abduction Convention and Children's Rights Revisited' (2012) IFL March, special issue.
[357] Article 13(2).
[358] See, for example, Kohm, L., 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' (2008) 10 JL & Fam Stud 337, 338.
[359] Table of Ratification available at http://www.hcch.net/index_en.php?act=conventions.status&cid=70, last accessed 01 May 2016.

Is there a movement of US courts towards a more child-centred interpretation of habitual residence and settlement in the context of the Convention on Child Abduction? Recently, the Supreme Court accepted a case[360] regarding a U.S. Army sergeant and a Scottish woman who had married while he was stationed in Germany. Subsequent to their move to Alabama and the divorce, the couple disputed the care of their daughter and the mother obtained a federal court order under the Hague Convention that Scotland was the child's country of habitual residence. As the mother had returned to Scotland with the child, the father appealed, however the Eleventh Circuit dismissed the case arguing that the child had returned to Scotland and was outside the Court's jurisdiction.[361]

However, recently, the Supreme Court reversed the decision of the Eleventh Circuit and Chief Justice Roberts argued that

"the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address 'a hypothetical state of facts'."[362]

Silberman and Spector propose to consider a brief automatic stay of a return order, pending an expedited hearing for a stay in the appellate court so as to allow the appellate court

"to take a preliminary look at the merits in the context of continuing or lifting a stay and then ordering an expedited appeal the best solution".[363]

It is quite surprising that the judge in a child abduction case concludes that U.S. Courts often "decide cases against foreign nations, whose choices to respect final rulings are not guaranteed."

The different approaches the US courts have taken suggest that habitual residence may well be in the child's best interest and may not be in the child's best interest in the context of the Hague Convention. Different interpretations

[360] *Chafin v Chafin*, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013).
[361] ibid.
[362] ibid.
[363] Silberman, L. and Spector, R., Dissecting *Chafin v Chafin*: the propriety of appeal after return of a child pursuant to the Hague Abduction Convention – mootness, stays and comity, (2013) July IFL, 189-191.

allow for the assumption of habitual residence of a child at a place which may not necessarily be in his/her best interest. The following analysis shall show whether the interaction of the Convention(s) and the Regulation creates a clearer framework for the determination of habitual residence or complicates the issue even more, as the Regulation draws cases considered outside the scope of the Regulation into the EU or causes a conflict of competence of Hague courts and courts applying the Regulation. In order to do so, the interpretation of habitual residence under the Regulation is required.

III. 'Habitual residence' under the Regulation

In *DT v LBT*[364], a Convention case, the court discussed in detail what it considered the requirements for habitual residence to be assumed and held that a child may be considered to be habitually resident in a place if he/she

"lives there voluntarily for a settled purpose for an appreciable period of time, long or short, temporary or permanent"

depending on social integration. The case raised the significant question whether adoption of habitual residence should be voluntary. It noted that in Brussels II *bis* cases, the court may not refuse to return a child on the basis of grave risk of harm if it is made evident that the authorities in the state where the child is supposed to be returned have made 'adequate and effective' arrangements for the protection of the child after the return.[365] Those are two different aspects but in this case the European framework into which the Convention has been drawn became very clear.[366]

In Mercredi v Chaffe[367], the Advocate General argued that the intention of just one parent in leaving a Member State may not be considered a relevant fact in the determination of the child's habitual residence. The court considered the meaning of habitual residence in the context of Articles 8 and 10 of Brussels II

[364] *DT v LBT*, *supra* note 312.
[365] ibid.
[366] see p. 103 et seqq..
[367] *Mercredi v Chaffe*, *supra* note 130, paras 90–91.

bis and restated the requirements stated in *Proceedings brought by A*[368], further mentioning

"*in order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent".*[369]

The court then held:

"in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. (…). Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."[370]

Whilst this definition appears to differ significantly from the traditional approach of the English courts discussed above, when *Mercredi v Chaffe* returned to the Court of Appeal, the European Court of Justice's definition of habitual residence was noted but not considered in detail.[371] This was an omission with consequences. In April 2011 the Supreme Court refused the father's application for permission to appeal against the decision of the Court of Appeal. This decision resulted from the judgment of the Court of Justice to which the Court of Appeal had referred three questions. The dismissal of his application for permission to appeal to the Supreme Court ended the fight of Mr Chaffe, an unmarried father, in the English courts with regard to the relationship with his daughter. The Court of Appeal finally raised doubts whether there was a wrongful removal of the child from England to La Réunion at all. Hence, the

[368] *Proceedings brought by A, supra* note 17.
[369] *Mercredi v Chaffe*, *supra* note 130, paras 49.
[370] ibid, para 51.
[371] *Mercredi v Chaffe, supra* note 130.

Court of Appeal ordered a request to the courts of La Réunion to accept a transfer of the English proceedings.

Subsequently, in *Re H-K*[372] the Court of Appeal held that the qualifiers 'a certain duration' and 'an adequate degree of permanence' used in *Mercredi v Chaffe*[373] had to be read consistently with Lord Scarman's opinion in *Shah* regarding residence. In Shah, the case referred to earlier, which did not concern children at all but set a standard for the interpretation of residence had that residence could be of short or long duration but had to be adopted "for settled purposes as part of the regular order of (…) life for the time being".[374]

In *Mercredi v Chaffe*[375] the Court had held that the factors to be considered for determining habitual residence depended on the age of the child and referring to the different stages of childhood, the Court held that the mother's and the child's integration in the social and family environment had to be considered: "the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State".[376] Whilst it held that the duration must not be decisive and might solely be indicative, it underlined the general rule that to acquire habitual residence the stay must be of a certain duration. As in *Proceedings brought by A*[377], the court held that it is for the national court to establish the habitual residence of the child, considering all circumstances of fact specific to each individual case.[378] The Court emphasised the importance of differentiating between children depending on different stages of childhood is in accordance with the aims of the Regulation and considered in detailed the factors which should be considered by the courts it has not given guidance on the concrete requirements.[379] This remaining degree of discretion seems very reasonable – it offers a degree of legal certainty but is not of a dictating character. The court confirmed the definition it had given in

[372] *Re H-K,* supra note 319.
[373] *Mercredi v Chaffe, supra* note 130.
[374] *Shah v Barnet Borough Council* [1983] 1 All ER 226.
[375] *Mercredi v Chaffe, supra* note 130.
[376] *ibid*, at para 56 and in the ruling.
[377] *Proceedings brought by A, supra* note 17.
[378] *Mercredi v Chaffe supra* note 367.
[379] *Mercredi v Chaffe, supra* note 130.

Proceedings brought by A but went a bit further in explaining how it is to be applied and that this may differ because of the factual conditions of the instant case.

Whilst McEleavy[380] criticises the 'more legalistic interpretation of European residence', the concepts mentioned by the Court provide a degree of certainty which was never achieved under the Convention. A concise analysis of the case makes evident that the difficulties occurred when the case returned to the English court and were significantly related to the fact that this was a case involving a court seized under the Convention. The application of the Regulation on the one hand which led to the involvement of the ECJ and the application of the Convention in the primary proceedings provides a good impression of the interactions which will be discussed in the course of this thesis. Those difficulties concern the principle of primacy and will have to be discussed in detail in the context of the interaction the Regulation and the Convention on Child Abduction. However, there were also difficulties related to the determination of habitual residence and referring to those in more detail will lead to the discussion on the interaction.

Following on from the judgment of the ECJ the matter was brought back before the Court of Appeal.[381] Prior to the hearing in the Court of Appeal the mother issued an application to amend her grounds of appeal, on the one hand arguing that she had not been served in compliance with the EU Service Regulation. The mother further sought to amend the grounds of appeal to challenge Mr Justice McFarlane's decision on the facts.[382]

An appeal as to issues of fact was not accepted and hence the attempt to challenge McFarlane J's determination that habitual residence had not been lost failed. McFarlane J had argued that the child had not lost her habitual residence when the proceedings commenced. The Appeal Court considered upon what acceptable basis of jurisdiction McFarlane J could have made "findings and

[380] Beaumont, P. and McEleavy, P., *supra* note 327.
[381] *Mercredi v Chaffe, supra* note 130.
[382] ibid.

declarations for the 'purposes of Article 15 of the Hague Convention 1980' though no request had been made by the judicial or administrative authorities of France under that Article and the proceedings under the Convention had been concluded by a judgment delivered 28 days earlier?"[383] So how was the guidance of the ECJ reflected in the Appeal Court? Before the Court of Appeal, the mother argued that the removal was lawful, that the judge should not have ordered return even if he had jurisdiction and additionally that the case should have been transferred to France under Article 15 of Brussels II *bis*.

Thorpe LJ concluded that the child had been habitually resident in England at the relevant time and accepted the submission that a lawful removal can turn into a wrongful retention if a return order issued by the court of the child's habitual residence, is not complied with. However, he insisted that considering the case a case of child abduction was an error of the lower court as the mother was exercising her right of freedom of movement and that the English orders restricted the legitimate decision of the French court.

On the issue of jurisdiction, the judges were divided as Thrope LJ concluded that McFarlane J had been wrong to claim jurisdiction, since he considered the wrong date for the question habitual residence. Elias LJ argued that the judge should have exercised his discretion to transfer the jurisdiction to the French court. Though Article 10 of the Regulation suggests that habitual residence can change without the consent of the other holder of parental rights no other English court had considered the possibility that habitual residence could change without consent. Whilst according to Thorpe LJ's arguments no Article 15 transfer should have taken place because no jurisdiction existed in England, Elias LJ's arguments allowed for a transfer, however, the grant of parental responsibility to the benefit of the father, granted by McFarlane J was maintained. However, while Thorpe LJ and Elias LJ disagreed on certain aspects they agreed that the approach taken by McFarlane J on habitual residence had been appropriate and was consistent with the decisions of the ECJ in *Proceedings brought by A.* This confirmed the earlier Court of Appeal

[383] ibid, at para 61.

decision in *Re S*[384] where Thorpe LJ had considered that *Proceedings brought by A* was consistent with previous English authorities. It was added that in determining the question of habitual residence it was only necessary to consider whether the child had lost her habitual residence in England and that if the child had no habitual residence in either France or England the provisions of Article 13 of the Regulation would apply.

In this case the mother was undecided as to what she would do and thus the child remained habitually resident in England, though the sole holder of custody had moved with her to France. The case brought up the significant question of whether a lawful removal could turn into a wrongful retention by orders granting parental rights or other rights of custody. This question will be of high relevance in the considerations on return orders and discussed later on. On habitual residence in the context of the Regulation this complex case brought more clarity. On the other hand, the handling of several other questions demonstrated that several courts are still hesitant or unconfident with regard to the application of the concepts of the Regulation. While the judgement of the ECJ laid down a test to be considered for the determination of the habitual residence in all circumstance which may arise under the Regulation, it also leaves some discretion for the national courts. If *Proceedings brought by A* and *Mercredi v Chaffe*[385] are not disregarded the Court has established influential guidance for the determination of habitual residence of children under the Regulation.

IV. The structure of enforcement and return under the Convention

Article 12 of the Convention provides for orders to “return [of] the child”. Naturally, the enforcement mechanism of the Convention on Child Abduction is limited to the enforcement of return or non-return order, as a result of the scope of the Convention. Article 12 of the Convention obliges the judicial or administrative authority concerned to order the return of the child, specifying those situations in which those authorities, hence usually the court, in the State

[384] *Re S* (A Child) [2009] EWCA Civ 1021, [2010] 1 FLR 1146.
[385] *Proceedings brought by A, supra* note 17; *Mercredi v Chaffe, supra* note 130.

to which the child has been removed are obliged to order the child's return. To this end there is a duty of the court where proceedings have begun within one year of the wrongful removal or retention and, secondly, there is a rule on conditions referring to the time-limitation. The obligation to order is levered whenever it can be shown that the child is "settled" in the "new environment". As there is no example as to how this is to be proved, the Convention leaves room for discretionary power of the national courts in this regard.[386]

The return proceedings mechanism under the Convention on Child Abduction is providing solutions in the absence of a harmonised set of rules of jurisdiction and in the absence of the set of provisions on recognition of decisions. The decision to return a child establishes jurisdiction of the state of habitual residence for the subsequent proceedings on the merits of the rights of custody/parental responsibility and a decision of non-return allows the state to which a child was abducted to exercise jurisdiction on the merits.

The general scheme is of course that the child is returned to the state where the child had his/her habitual residence prior to abduction, as discussed in the Chapter on habitual residence in the Convention and jurisdiction in the Convention.[387] Further, Article 16 of the Convention contains a prohibition to exercise jurisdiction on the substance of rights of custody (parental responsibility) by the state to which the child was abducted/removed. Article 12 remains silent on the state to which the child shall be returned thereunder. According to the Explanatory Report, "when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve."[388] The third paragraph refers to a possible stay of proceedings.[389]

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[386] as discussed at p. 71 et seqq.; p. 116 et seqq. hereof.
[387] as discussed in chapter 3 A. II herein.
[388] Perez-Vera, E., Explanatory Report, *supra* note 285, para 110.
[389] ibid, para 79, "This provision must be seen in conjunction with the provisions of the Convention (specifically Article 14(2)) providing that automatic recognition and in particular the updating of civil-status records do not require any special procedure if the judgment of the State of origin is one against which no further appeal lies under the law of that Member State.

The discretionary power of the courts with respect to the different aspects in Article 12 of the Convention became obvious in the different interpretations in Hague cases in England and the United States.

In the House of Lords case of *Re H,* the House of Lords held that the removal and retention referred to in Article 12 of the Convention mean removal and retention out of the jurisdiction of the courts of the child's State of habitual residence.[390] In the Appeal court case of *Re M* the court expressed a firm view that the order to return or not to return a child under Article 12 of the Convention is to be considered final in Hague Convention proceedings.[391] It further noted that Article 13 of the Convention, "deals with specific instances where the welfare of the child may inhibit an order for return under Art 12". For Article 13 to be raised

"*a court has to be satisfied that the matters raised are so important as to displace the prima facie requirement to return the child under Article 12 upon proof of wrongful removal or wrongful retention under Article 3."*[392]

Article 12 of the Convention has however been rarely of concern in English appeal and Supreme court cases. Mostly, as in the more recent cases, it was just mentioned in the context of the exceptions set forth in Article 13 of the Convention.[393]

This Article allows the court of a Member State in which recognition is sought to stay the proceedings if an ordinary appeal against the judgment has been lodged. For stay of enforcement, see Article 27 (and the commentary thereon in paragraph 94).
In the case of judgments given in Ireland or the United Kingdom, provision is made for special features of their national legislation."

[390] *Re S* (Abduction: Custody Rights) [1991] 2 AC 476.

[391] *Re M* (Abduction: Undertakings) [1995] 1 FLR 1021.

[392] ibid.

[393] *Re D* (A Child), *supra* note 315, *Re D* has hitherto been the only Supreme Court/House of Lords case with respect to Article 12 and at Appeal court level for instance *Re A and Another* (Minors: Abduction) [1991] 2 FLR 241 1990; *Re H B* (Abduction: Children's Objections) [1998] 1 FLR 422 1997 and for instance Singh v Singh 1998 SC 68 1997 refer to it in the context of Article 13; there have been no decisions with respect to Article 12 at this court level during the last twenty years.

The same applied to United States Federal court cases, were in the context of *Walsh v Walsh*,[394] and *England v England*,[395] Article 12 of the Convention was only mentioned as a subsidiary aspect to Article 13 of the Convention considerations.

Only in the recent, *Yaman v Yaman*,[396] the court discussed the interpretation of "settled" in the context of Article 12 of the Convention and explicitly stated that in its view, if a court finds a child well settled, the court still retains discretion to weigh against such finding before deciding to order the child's return. Referring to the text of the Convention, the Convention's purposes, the inherent equitable powers of federal courts in the United States, and the insights of the Executive Branch, the court stated that in its view a court is not prohibited from ordering the child returned if it finds a child to be settled. The court hence considered it at the discretion of a federal court in the United States, to order, at its discretion, the return of a child found to be "now settled", as long as the lower court had reviewed all the circumstances and considerations and had elected to refuse the return the child.

In England, *Cannon v Cannon* has hitherto been the only case at appeal level in which Article 12 was explicitly discussed.[397]

The Court of Appeal found that the existing case law and Article 12 of the Convention conferred upon judges a discretion with respect to the settlement aspect, so as to achieve valuable outcomes in individual cases. It held that both the physical characteristics of settlement and the emotional and psychological elements had to be considered with respect to settlement and that trial judges should have critical regard to an alleged settlement based on concealment and deceit.[398]

The Court of Appeal also held that residual discretion existed to make a return order even if settlement was established, with a reference to Article 18 of the

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[394] *Walsh v Walsh*, No. 99-1747 (1st Cir. July 25. 2000).
[395] *England v England*, 234 F.3d 268 (5th Cir. 2000).
[396] *Yaman v Yaman*, 730 F.3d 1 (1st Cir. 2013).
[397] *Cannon v Cannon* [2004] EWCA CIV 1330.
[398] ibid.

Convention.[399] Hence, at the appellate court level in the United States, there is at least a corresponding view with regard to discretion to be exercised under Article 12 of the Convention as far as settlement is concerned.

As for the civil law courts, where the interpretation of particular aspects of the Convention is restricted to the case itself rather than to a more general interpretation, a French Appeal Court case is one of the very few referring to Article 12(2) of the Convention.[400] In this case, the court considered that the return could be denied in the event of the child's settlement in his or her new environment and pointed to psychological and academic as well as extra-curricular activities for the interpretation of settlement by the trial court. It should be noted that a hearing had taken place in this case and based on all findings the court ruled that, in the greater interest of the children, their successful settlement in France conflicted with their return to the Netherlands, regardless of the administrative status of the mother. At superior appellate level, the French Cour de Cassation only referred to settlement in the new environment in the context of the specific case.[401]

In Germany, the appellate courts only referred to Article 12 of the Convention in the context of Article 12 of the Convention decisions but not interpreted or even mentioned it at all.[402]

Under Article 13(b) of the Convention the concept is that the court may refuse to order the child's return if it is shown that

"*there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.*"

One difficulty which regularly arises with respect to this rule is the wide degree of discretion and the question is whether this will actually be in the best interests of the children concerned. Different contracting states' legal systems have a different understanding of 'undertakings' as set forth in Article 13(b) of the

[399] ibid.
[400] CA Paris, 8 août 2008, Nos de RG 08/05791 et 08/07826.
[401] Cass Civ 1ère 12 décembre 2006 (N° de pourvoi: 06-13177).
[402] OLG Dresden, 10 UF 753/01, 21 January 2002 and the Oberlandesgericht Köln, 21 UF 70/01, 12 April 2001.

Convention and the court may not even have an option to seise jurisdiction of its own motion upon a child's return. The criterion of grave risk has been rarely referred to directly in the superior courts.

In *Re S* the Supreme Court even referred to anxieties of a mother about return which were not based upon objective risk but nevertheless it held that the Court of Appeal had failed to appreciate the mother's concerns and that the Appeal Court had failed to recognise that the judgment about the level of risk required for the purposes of Art 13(b) of the Convention was one to be made by the trial judge.[403] It held that it was not open to the Court of Appeal to substitute its contrary view.[404]

In *Re E* the Court held that the applicable standard of proof was the same as for the ordinary balance of probabilities and the risk must be "grave", not just "real".[405] It further held that an "intolerable situation" had to be interpreted subjectively, from the perspective of the child concerned.

It considered the exposure to the harmful effects of seeing and hearing the physical or psychological abuse of a parent such a situation.

However, it also noted that the protective measures to be put in place to ensure that the child did not face an intolerable situation should be considered by the trial court.

Hence, it suggested that the trial court should first consider if there was a grave risk of harm and then how the child could be protected against the risk. In particular, the Supreme Court recognized that the appropriate protective measures and their efficacy would vary in every country.

In *Re D*[406] the court only made reference to the *Perez* Report.[407] In the US, no superior appellate court case has dealt with the interpretation of grave risk under Article 13(b) of the Convention.

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[403] *Re S* (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2 A.C. 257.
[404] ibid.
[405] *Re E* (Children) (Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 A.C. 144, para 33.
[406] *Re D* (A Child), *supra* note 315.
[407] Perez-Vera, E., Explanatory Report, *supra* note 285.

At appellate court level, grave risk has been referred to in some cases but not necessarily interpreted beyond application to the circumstances of the case.[408]

In *Acosta v Acosta*[409] the Court held that Article 13(b) of the Convention provided a narrow exception to the Convention's rule of return, so that general evidence of harm was insufficient. It noted that a grave risk could be assumed in cases involving "serious abuse or neglect". Both the probability and the magnitude of the harm were held to be relevant.

In *Walsh v Walsh*[410] the court noted that the Convention does not require the risk to be "immediate"; only that the risk must be grave.

And in *Baran v Beaty*[411] the court referred to *Friedrich*, where the Court of Appeals for the Sixth Circuit had stated that a grave risk of harm may exist

"when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection"[412]

but also noted that not all courts have followed this interpretation, underlining that many courts have held that the reviewing court has discretion to deny the return outright where a return would expose the child to a grave risk of harm. It held that there is no duty to consider what protection could mitigate the risk.[413]

It appears that at the start of the last decade the courts were much more hesitant to assume the existence of a grave risk,[414] in continuation of the strict

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[408] Sanchez v RGL ex rel. Hernandez, 2014 U.S. App. LEXIS 14849 (5th Cir. 2014); *Souratgar v Fair*, 720 F.3d 96 (2nd Cir. 2013); *Khan v Fatima*, 680 F.3d 781 (7th Cir. 2012) Evidence of Grave Risk (only the dissenting judge referred to the interpretation of the Convention and concluded that the Convention aimed at a narrow interpretation; opinion of Hamilton CJ); *Taylor v Taylor*, 502 Fed.Appx. 854, 2012 WL 6631395 (C.A.11 (Fla.)) (11th Cir. 2012).

[409] *Acosta v Acosta*, 725 F.3d 868 (8th Cir. 2013).

[410] *Walsh v Walsh, supra* note 394.

[411] *Baran v Beaty*, 526 F.3d 1340 (11th Cir. 2008).

[412] *Friedrich v Friedrich,* 78 F.3d 1060 (6th Cir. 1996).

[413] *Baran v Beaty*, *supra* note 411.

[414] In *Danaipour v McLarey*, 286 F.3d 1 (1st Cir.2002) the court laid considerable emphasis on the protection from the intolerable situation; In *March v. Levine*, 249 F.3d 462 (6th Cir. 2001) the court held that a default judgment which found that the father had killed the mother, was not convincing evidence that the children would face a grave risk of harm if returned. Furthermore, the court stated that the issues regarding the mother's death should be addressed in a custody hearing and not in the Convention case, pointing to a possible protection by the Mexican authorities.

and fierce approach the 6th Circuit took in *Friedrich* to which this chapter already referred in the context of the interpretation of habitual residence.

On grave risk the court held:

"The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence.

[…] we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute-- e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. Psychological evidence of the sort Mrs. F. introduced in the proceeding below is only relevant if it helps prove the existence of one of these two situations."[415]

Compared with the structure and interpretation of the central concepts under the Regulation, the Convention's central concepts have been approached with a wide degree of discretion, as evidently reflected in the case law of the superior courts in England and the US.

Based on this analysis of the central concepts both under the Convention and the Regulation, the next chapter will consider the direct interrelation of the instruments.

[415] *Friedrich v Friedrich supra* note 412, part III.

V. The direct interrelation of the Convention and the Regulation

A core purpose of the Convention on Child Abduction was to abandon parents' incentives to move to another country in order to obtain custody.[416] In the United States this objective has been taken into account in most cases[417] and the Convention has become an important standard for the settlement of abduction disputes.[418] In the EU, however, the Convention works in interaction with the Regulation, both directly, as it is envisaged in the respective Articles, and furthermore, under the umbrella of the general provisions regarding the interrelation.

Under Articles 59 (1) and 62 (1) of the Regulation, the Regulation supersedes all multilateral conventions between Member States relating to matters to which the Regulation applies, to the extent those conventions cover such matters. Hence, the Regulation does not only have priority over the Convention on Child Abduction but replaces them, however, whilst in cases of child abduction covered by the Regulation, the rules of the Regulation prevail over the rules of the Convention in relations between Member States, Article 11 of the Regulation explicitly refers to the Convention. The prompt return of the child to his or her habitual residence is the cornerstone of the Regulation, after a 'child abduction' meaning a wrongful removal and a wrongful retention pursuant to Article 2 of the Regulation. According to McEleavy[419] the Regulation reflects a compromise between the EU Member States which intended to replace the Convention and those which intended to save it and were opposed to creating EU-specific provisions with regard to child abduction. To this extent, there is no ultimate replacement and the term "supersedes" used in Article 59(1) of the Regulation is restricted by the wording in Article 11 of the Regulation insofar as it sets the ground for an interaction. As Article 1 of the Regulation and Article 10 (a) of the Convention demonstrate, both the Convention and the Regulation aim

[416] *supra* note 345.
[417] US Department of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (2005), available at https://travel.state.gov/content/dam/childabduction/complianceReports/2005ComplianceReport.pdf, last accessed 01 May 2016.
[418] ibid.
[419] McEleavy, P., *supra* note 25.

at enabling and ensuring a prompt return of the child to the country of the child's habitual residence, however, the procedural settings are different. Whilst Article 10 of the Regulation contains a distinct, clear jurisdiction rule with respect to child abduction situations and Article 11 of the Regulation sets forth a procedure by way of reference to the Convention, the Convention lacks such a set of rules with respect to jurisdiction, as has been discussed in the context of the Convention at the start of this Chapter.

As a general rule, Article 10 of the Regulation provides that the courts of the Member State where the child was habitually resident before the abduction retain their jurisdiction to decide on the case after the abduction. Jurisdiction may be attributed to the courts of the new Member State only if the child has i) either acquired habitual residence in the requested Member State and the persons having rights of custody have acquiesced in the removal or retention or (ii) if the child has acquired habitual residence in another Member State and the child has resided in that Member State for at least one year after the parent with rights of custody gained knowledge or should have gained knowledge of the whereabouts of the child and has not lodged a request for the return of the child within this period. Additionally, the child must have settled in the new environment.[420]

Article 15 of the Regulation further differentiates it from the Convention. This rule allows, as an exception, a court to transfer a case to a court of another Member State if the latter is "better placed" to hear the case. As jurisdiction does not shift automatically by means of the general rule of Article 8, and there may be circumstances under which the court seised is not the best placed court to hear the case, it is a considerable merit that the court may transfer the case to a court of another Member State provided this is in the best interests of the child. Hence, the two superordinate requirements are that the other court is

[420] Article 10: "In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and: […] (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:[…]".

better placed and that the transfer is in the best interest of the child. The required situation is that the child must have a 'particular connection' with the other Member State and Article 15(3) of the Regulation lists five situations in which such a connection is assumed to exist.[421]

According to Article 15(4) of the Regulation the general rule is that the court of the Member State having jurisdiction sets a time limit by which the courts of the other Member State shall be seised in accordance with paragraph 1. Further, pursuant to this paragraph, If the courts are not seised by that time, the court which has been seised continues to exercise jurisdiction in accordance with Articles 8 to 14.

Following this section Article 15(5) sets forth that

"*the courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b)*".

Following this, the court first seised shall decline jurisdiction. If it would not be in the best interest to transfer, the court first seised will continue to exercise jurisdiction in accordance with Articles 8 to 14.

Since the court which has received the request for a transfer must decide, within six weeks of being seised, whether or not it accepts the transfer, the decisive factor should always be whether the transfer would be in the best interests of the child. If, however the second court declines jurisdiction or, within six weeks of being seised, does not accept jurisdiction, jurisdiction remains with the original court and the original court must exercise it.

When there is an interrelation of the Convention and the Regulation, the question of interpretation of the terms provided in the respective provisions becomes even more relevant than in the stand-alone context. Whilst the ECJ has suggested in *Proceedings brought by A*[422], that the provisions of Brussels II

[421] as discussed herein at p.68 and p. 150 et seqq.
[422] *Proceedings brought by A*, *supra* note 17.

bis required an autonomous interpretation of its provisions as opposed to an interpretation based on domestic law, the context of Article 11 and its reference to Articles 12, 13 and 13b of the Convention brings up the question of a harmonised interpretation of concepts. Article 11 sets forth a direct reference to the Convention, the structure of the provision was introduced in Chapter 2. Making evident that the Convention is in fact interconnected with the Regulation, the ECJ outlined in *Rinau*[423] that the rules on the enforceability of judgments "*tie[s] in very closely with the provisions of the 1980 Hague Convention*" and that the "guiding principles" of the Hague Convention were adapted by the Regulation. Continuing that the Regulations "complements" the provisions of the Convention and that Article 11(8) must be understood chronologically, the Court underlines the interaction. Hence, it is worth considering *Rinau* in more detail. Whilst Article 11 establishes procedural rules for the handling of Hague return applications in the courts of EU Member States, the most important part of the rule is Article 11(6)-(8) , which establishes cross-border co-operation between courts which can lead to a return order made in the State of the child's former habitual residence. The procedure set forth in Article 11(6)-(8) allows the court in the state of the habitual residence of the child before the abduction to issue a new order requiring the return of the child, following an Article 13 non-return order under the Convention from the state where the child was removed to after the abduction. Insofar as judgments pursuant to Article 13 of the Convention are concerned, the Court points to the significance of the Hague Convention, whenever relevant. Article 42(2)(c) requires a court to take into consideration the reasons for and evidence underlying the order issued pursuant to Article 13 of the Convention.

In the Appeal Court case of *Re F*,[424] Thorpe LJ suggested that in an Convention case within the European Union, where a summary return was refused on the basis of one of the exceptions set forth in Article 13, the left behind parent should pursue a procedure under Article 11(6)-(8) of the Regulation rather than initiating an appeal in the requested State.

[423] *Rinau*, *supra* note 19.
[424] *Re F* (A Child) [2009] EWCA Civ 416.

Even shortly before the ECJ's observations in the English court in *B v D*[425] had held that where different remedies were available in different jurisdictions the Hague Convention proceedings should not take automatic precedence but that the Regulation's general and special rules on jurisdiction applied.

In most Appeal Court cases in England which have dealt with both Article 11 of the Regulation and Article 13 of the Convention the issue was the hearing of the child or the consideration of the child's objections[426] rather than the overriding nature of Article 11(6–8) and Article 41 of the Regulation (automatic enforcement) over non-return orders based on Article 13 of the Convention, as will be addressed in the following, the general prevailing character of the provisions of the Regulation in intra-community cases over the application of the Convention provisions has not been thoroughly reflected in the Court of Appeal case law, which makes evident that applications are made without a reference to Article 11 of the Regulation and only Article 13(2) of the Convention is invoked.[427]

Whilst Article 11 of Brussels II *bis* determines the requirements of return orders on the basis of the Hague Convention, it also sets forth that under exceptional circumstances, Article 13(2) permits a court to refuse to render a return order if the child who is old and mature enough to do so, refuses to accept the return. However, according to Article 11(4) of the Regulation, a court is not permitted to refuse the return if there is proof that adequate measures have been taken to secure the protection of the child after the return.[428] The discretion the Regulation leaves to the courts to determine whether the measures are adequate and the proof sufficient is not of an overwhelming character. The main

[425] *B v D* [2008] EWHC 1246 (Fam); [2009] Fam. Law 176.
[426] *Re F* (Abduction: Joinder of Child as Party) [2007] EWCA Civ 393; Re M (A Child) (Abduction: Child's Objections to Return) [2007] EWCA Civ 260; *Re F* (Abduction: Child's Wishes) [2007] EWCA Civ 468; *Re W* (Children) [2010] EWCA Civ 520, [2010] 2 F.L.R. 1165.
[427] *Re LC* (Children) (International Abduction: Child's Objections to Return) [2013] EWCA Civ 1058; *Re G* (Abduction: Children's Objections) [2010] EWCA Civ 1232, [2011] 1 F.L.R. 1645; *Re J* (Abduction: Children's Objections) [2011] EWCA Civ 1448, [2012] 1 F.L.R. 457; *Re W* (Children) [2010] EWCA Civ 520, [2010] 2 F.L.R. 1165.
[428] Article 11(4) of the Regulation. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

problem rather seems that the clarification provided in the recent case of *Bradbrooke*[429] solely refers to Article 11(7) and (8) of the Regulation and the European Court of Justice has hitherto not been requested to clarify the obligatory nature of the Article 11(4) of the Regulation. With respect to the question of children removed to non-Member States Article 11(1) completely excludes situations where a child is retained or removed to a non-Member States as it explicitly refers to situations where

"*a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the […]"the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.in order to obtain the return of a child that has been wrongfully removed or retained in a Member State."*[430]

This seems consistent with the general approach of the Regulation that the courts of the state of the former habitual residence maintain jurisdiction, with precedence so that the courts of the Member State in which the child wrongfully stays have very limited measures to oppose a return. On the other this approach seems inconsistent with Recital 17 of the Regulation:

"*In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end [the 1980 Hague Convention] would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any*

[429] Case C‑498/14 PPU, *Bradbrooke*.
[430] Article 11(1) of the Regulation.

special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained."[431]

Prior to the implementation of the Regulation, the Convention would have exclusively decided where any case regarding a return would be decided and a non-return order by this court would have been exclusively considered under the Convention. Now, with the return mechanism exceptions set forth in Article 11(1)-(5) of the Regulation, the more specific provisions in this Article are applied in intra-Community cases, based however on the presumption that those provisions complement the rules of the Convention with respect to a return order.[432]

The wording of the Practice Guide suggests that the provisions of the Convention are "complemented by Article 11(1) to (5) of the Regulation",[433] however, whilst paras (1)-(5) are based on the Convention's principle that the court shall order the immediate return of the child unless the exceptions set forth in Article 13(b) of the Convention apply, it adds to those restrictions with a further restriction in paragraph (4) that return may not be denied if it is assured that the measures referred to therein will be taken in the Member State of origin.

Pursuant to Article 13(b) of the Convention the court is not obliged to order the return if it would expose the child to physical or psychological harm or would place the child in an intolerable situation.[434] Pursuant to Article 11(4) of the Regulation, even where there is such risk of an exposure of the child to such harm, but

"*it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return.*"

[431] Recital 17 of the Regulation.
[432] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 4.3.1.
[433] ibid, para 4.3.1.
[434] as discussed at p. 123 et seqq. herein.

Article 11(4) of the Regulation has however been very rarely been referred to at all in the courts. In the case of *Re A*[435] the return was refused and Article 11(4) was referred to. Taking into account the boy's refusal to countenance a return, the court) concluded that the Article 13(b) exception had been established and that no proof had been provided that adequate arrangements had been made to secure the protection of the child subsequent to the return pursuant to Article 11(4) of the Regulation.[436] In the French superior courts Article 11(4) has also very rarely been referred to same[437] and in the German courts has not even been considered. A reason for this reluctance may be the complexity of paragraphs (2)-(5) or the higher potential for conflict which is embodied in paragraphs (6)-(8).

Hence, Article 11 of the Regulation modifies the procedure under the Convention in cases where both the requesting and the requested States are parties to the Regulation and there are on the one hand, provisions which relate generally to the operation of the Convention and, on the other hand, provisions which restrict the scope for refusing to return the child.

In the Supreme Court only two cases have hitherto dealt with the interrelation of Article 13 of the Convention and Article 11 of the Regulation.[438] However, in *in the Matter of LC* the Supreme Court explicitly referred to the complexity imposed by the additional provisions in the Regulation and at the same time it emphasised that

"*by article 42(1), [that,] provided that the judge in the state of habitual residence shall have certified that the parties and, if appropriate, the child were given an opportunity to be heard and that he took account of the reasons for the refusal of the requested court to order the child's return under the Convention, there*

[435] *Re A*, *supra* note 180.
[436] *Klentzeris v Klentzeris* [2007] EWCA Civ 533, but no explanation with respect to Art 11(4) of the Regulation.
[437] CA Paris, 31 mai 2012, No de RG 12/05844 (France) court only referred to Art. 13 I b HC; CA Bordeaux, 19 janvier 2007, No de RG 06/002739, court referred to Art. 13 I b of the Convention and 13 II und Art. 11 of the Regulation and only very shortly considered the aspect "adequate protection measures" without any interpretation.
[438] *Re D, supra* note 315; *In the Matter of LC* (Children) (International Abduction: Child's Objections to Return) [2014] UKSC 1, [2014] 2 W.L.R. 124.

can be no facility for challenge in the requested state to his order for the child's return."[439]

The Supreme Court also referred to the statement made by the European Court of Justice in *Rinau* that the order "enjoys procedural autonomy".[440]

As the English Supreme court's reflections on the procedure with respect to the non-enforcement of orders demonstrates, Article 11(8) is particularly prone to criticism

"Thus B2R has added a dramatic further dimension to proceedings under the Convention in which the application is for the child's return to a fellow EU state. When, on whatever basis, it refuses an application under the Convention for return to a non-EU state, a court in England and Wales will conventionally embark […] on a merits-based inquiry into the arrangements which will best serve the welfare of the child; and it will reasonably anticipate, particularly in the light of the presence of the child here, that its decision will be fully enforceable. But when, by reference to article 13 of the Convention, it refuses an application for a child's return to an EU state, it is aware that an order for return, immune from challenge, may nevertheless be forthcoming from that state; and that therefore the order for non-return may well provide no more than a breathing-space."[441]

Whilst, in principle, according to Arts. 59(1) and 62(1) of the Regulation, the Regulation supersedes all conventions between Member States relating to matters to which the Regulation applies, in so far as they cover such matters, the above has already demonstrated that this structure does not mean that the interrelation works without problems of subsidiarity. As far as Article 11(2)-(5) is concerned, this primarily means that the Regulations provisions have hitherto remained unnoticed by the courts in England so that the Practice Guide's assumption that the "rules of the Regulation (Article 11(2) to (5)) prevail over the

[439] *In the Matter of LC,* ibid, para 20.
[440] ibid.
[441] ibid, para 21.

relevant rules of the Convention"[442] have not been reflected in practice. It has very much been a complementary approach, with a priority of the application of Article 13 of the Convention.

For Article 11 (6)-(8) of the Regulation the situation is different, as will be discussed in a separate chapter, in which it will be analysed how the ECJ enforces the primacy of Brussels II *bis*, and, as a 'side effect' Convention on Child Protection over the Convention on Child Abduction, with regard to non-return orders based on Article 13 of the Convention as those orders may be overridden by Article 11(6–8) and Article 41 of the Regulation (automatic enforcement).[443]

In *Zarraga*[444] the Court of Justice confirmed Article 11(8) to 'override' an order of non-return pursuant to Article 13 of the Convention on Child Abduction which required a German court to enforce an order of return made by a Spanish court after a court in Germany had refused to return the child. Mr Zarraga had brought proceedings in Germany to obtain the return of the child to Spain under the Hague Convention. As Mr Zarraga had further applied for the judgment of the Spanish Court for custody to be recognised under Article 42 of the Regulation, the German court argued there had been violation of a fundamental right in not hearing the child issuing the Article 42 certificate and requested a preliminary ruling from the ECJ as to whether it could refuse to recognise a judgment. Whilst this primacy may seem awkward at first, the mechanism of Article 42 is such that a return order issued in the state of the origin of the child will always supersede a non-return order delivered in another state, and will not need *exequatur*, nor any specific procedure, to be enforced in the other state. The procedure is strict and has been criticised[445] as will later be considered in detail in the section on non-return orders. However, it embraces the concept of

[442] Practice Guide for the application of the Regulation (2005), *supra* note 30, section 4.3.6.
[443] Chapter 4 A.
[444] Case C-491/10 PPU, *Zarraga v Pelz,* [2010] ECR I-14247.
[445] Walker, L.; Beaumont, P., 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of human Rights and the European Court of Justice' (2011) J Priv Int L, 7, 231.

consistency that the state of origin has primacy over another state the child may have been taken to.

B. Relation of and interaction with the Hague Convention on the Protection of Children

Having discussed the interrelation with the Convention on Child Abduction, the following will analyse the interrelation with the Convention on Child Protection.

I. The structure and the particularities of the Convention

In addition to the interaction of the Convention on Child Abduction, family lawyers must also take into account the Convention on Child Protection, which deals with jurisdiction, recognition and enforcement related to "[the] protection of the person or property of the child". Though the wording "measures of protection" suggests that the Convention on Child Protection would solely deal with public care and protection, it covers almost every order that can be made in respect of a child[446] and it is evident that this will result in interactions with the Regulation. And even though it would seem clear at first that Brussels II *bis* takes precedence because of the primacy approach it takes in general, the situation is a more distinct than this first impression suggests.

Even predating the Treaty of Amsterdam, the negotiation of the Convention on Child Protection involved all the then Member States of the European Union, under the Hague Conference umbrella and the delays in the ratification of the Convention on Child Protection to a considerable extent resulted from the

[446] Article 1 of the Convention on Child Protection sets forth the scope namely:
"(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
(b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
(c) to determine the law applicable to parental responsibility;
(d) to provide for the recognition and enforcement of such measures or protection in all Contracting States;
(e) to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention."

European Union and its processes. Only when the revised Regulation was confirmed a Council Decision was issued authorizing Member States to sign the Convention in the interests of the Community as part of the November 2002 compromise on the issue of child abduction.[447] There has hence, right from the start, been a relation of the Convention on Child Protection and the Regulation.

As the EC had acquired competence over certain aspects included the Convention on Child Protection,[448] ratification or accession to the instrument had to be in a common move, by all Member States. In the United Kingdom the Convention on Child Protection has been recognised as a Community Treaty for the purposes of the European Communities Act 1972,[449] so that implementation has been achieved via regulations under section 2(2) of that Act.

Compared to the Regulation's features of automatic enforceability of judgments,[450] and the primacy of the Member State of habitual residence in intra-EU abduction cases,[451] the 1996 Convention's provisions may seem to have limited innovation. However, it also contains features that are absent from the Regulation, including rules on choice of law and cooperation.[452] Also, the Convention on Child Protection approaches certain situations completely different than the Regulation. The clearest distinction is that the Convention on Child Protection deals with issues of applicable law[453] and contains a general choice of law rule for parental responsibility.[454] The geographical scope of the

[447] Council Decision 2003/93 [2003] OJ L048/1-2. The then Member States signed the Convention on 1 April 2003, except for the Netherlands, which had already signed on 1 September 1997.
[448] Lugano Convention [2006] ECR I-1145.
[449] S 1(3); also see the 'The European Communities' (Definition of Treaties) (1996) Hague Convention on Protection of Children Etc) Order 2009: available at www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111487563_en_1, last accessed 01 May 2016, there the Explanatory Memorandum.
[450] Articles 40-42 of the Regulation.
[451] Article 10 of the Regulation.
[452] Chapter V of Convention on Child Protection.
[453] Article 15 of the Convention on Child Protection.
[454] Articles 16 -18 of the Convention on Child Protection.

Convention on Child Protection rules varies depending on the Chapter under consideration.[455]

The scope and objectives set forth in Chapter I of the Convention on Child Protection also provides for a description of the "measures for the protection" referred to Article 1 in Article 3 and lists exemplary situations and areas of application. A summary of the main features of the Convention on Child Protection will provide for a framework which provisions are of central interest for considering the interrelation and for comparison with the Regulation. The jurisdiction provisions of the Convention on Child Protection (Chapter II of the Convention on Child Protection) only apply where there is an international context and a child is habitually resident in a Contracting State, or, is present in such a State, and has no habitual residence at all or is a refugee or is displaced in an international context.[456] In contrast to the Regulation, recognition is granted to measures made in a Contracting State under the bases of jurisdiction provided for in Chapter II of the Convention on Child Protection.[457] Whilst the general rule is that the law of the Contracting State shall be applied (Article 15(1) of the Convention) exceptions are provided for in Article 15 (2) and (3) of the Convention, with regard to parental responsibility there is only the exception of a change in habitual residence affecting the change of the applicable law (Article 17 of the Convention on Child Protection). With regard to protective measures, provisions on cooperation exist, however not in all cases a mandatory obligation to co-operate is created.[458] The application of the Convention in situations involving a non-Contracting State are clearer referred to in the Convention than in the Regulation as the Convention refers to situations involving non-Contracting States in Article 11(3), 12(3), 20, 21(2), 23(2) whilst the Regulation solely refers to non-Member States in the provision on prorogation of jurisdiction in Article 12(4) with respect to habitual residence outside the territorial scope of the Regulation and the Convention on Child

[455] Lagarde Report, *supra* note 116 at para. 17. cf Art. 13.
[456] Articles 5-14 of the 1996 Convention.
[457] Clive, E., 'The New Hague Convention on Children' (1998) Juridical Review 169-188, 171.
[458] ''may request'' is used both in Article 34 and 35 with regard to request by authorities in one Contracting State to authorities in another Contracting State.

Protection and in Articles 22(d) and 23(f) in the context of grounds of non-recognition. Exclusivity of jurisdiction under the Convention on Child Protection is imposed only where a child is habitually resident in a Contracting State, or where a child is present and is a refugee or is internationally displaced, or where a child is present and has no habitual residence at all.[459]

If the child has no habitual residence at all, both Article 6 of the Convention and Article 13 of the Regulation seek to claim jurisdiction, whilst when a child is habitually resident in a third State the Convention does not seek to claim jurisdiction. Hence, the Convention, a first evaluation suggests, does not draw into its application, cases outside its scope, a feature often criticised with respect to the Regulation as it applies even if the child is outside the Member States, removed to a third state but had its habitual residence in a Member State (Article 12(4), taking the approach that jurisdiction of a Member State prevails and remains in the Member State in accordance with Article 12. However, where a child is not habitually resident in a Member State but in a Contracting State the Convention on Child Protection or - in cases of wrongful removal or retention - the Convention on Child Abduction applies.

One of the significant features of the Convention on Child Protection is the common rules of jurisdiction provided for in Articles 5–14. Jurisdiction pursuant to Article 5 of the Convention[460] is subject only to jurisdiction in the original Contracting State of habitual residence from where the child has been wrongfully removed to or retained in another Contracting State.[461] But it does not guarantee the jurisdiction of the State of origin permanently.[462] Also, the rules on jurisdiction determine the Contracting State whose authorities have

[459] Articles 5-14 of the 1996 Convention.

[460] Article 5 of the 1996 Convention: (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

[461] Article 7 of the Convention on Child Protection.

[462] If in the context of Convention proceedings, return proceedings conclude without an order to return the child, and the child has been in the new State for more than 12 months since the left parent in the state from which the child has been taken had or should have had knowledge of his/her whereabouts, and the child has become habitually resident, the new place will have jurisdiction.

jurisdiction, not the authority within the Contracting State. As in the Convention on Child Abduction, the term 'habitual residence' is not defined in the Convention on Child Protection. Under the Convention on Child Protection, habitual residence serves to assess the courts of which Contracting State(s) have jurisdiction to take measures of protection and whether their decisions should be recognised and enforced on other Contracting States. The courts at the child's habitual residence have basic jurisdiction to take 'measures directed to the protection' of the child. Contrary to the primacy of jurisdiction of the courts in the Member State of the original or established habitual residence (Article 8(2) with the reference to Articles 9, 10 and 12), Article 8 of the Convention allows for the authority having jurisdiction under Articles 5 or 6 to decide that an authority in another Contracting State may be "better placed" to determine the best interests of the child. The authority may either request that other authority (either directly or with the assistance of the Central Authority) assumes jurisdiction or to suspend taking the case and request the parties to submit the request to the other authority. In Chapter 2 of this thesis it was analysed how the wording "better placed" is used in the framework and has been interpreted in the context of the Regulation.[463] As discussed in Chapter 1 and 2 in the context of the multiple provisions in which the term 'best interest' is used, there is no valuable guidance in the Lagarde Report as to what "better placed" shall mean. Considering that the Lagarde Report also leaves it to the discretion of the national courts to determine the best interests of the child it "is left to the judgment of the authority normally having jurisdiction, which should therefore show proof of discernment."[464] The Handbook published by the Hague Conference in 2014 is no further guidance as it cites the Report[465] and the degree of discretion with respect to whether or not a court "considers" another "better placed" is evidently high.

[463] as discussed herein at pp. 50, 54, 69, 106, 140.
[464] Lagarde Report, *supra* note 116, p. 559.
[465] Practical Handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children available at https://assets.hcch.net/upload/handbook34en.pdf, para 5.4, last accessed 01 May 2016.

Article 8(2) (d) refers to transfer of jurisdiction to "a State with which the child has a substantial connection"' and it is agreed that jurisdiction may be declined under residual rules, such as the doctrine of *forum non conveniens.*[466] There is flexibility with respect to *lis pendens*, for such an action is not restricted to the procedure set down in Articles 8 and 9.[467] To the Regulation the principle of *perpetuatio fori* applies, to the Convention, on the contrary it expressly does not.[468] Article 9 of the Convention on Child Protection solely permits requests to be made to the competent authority of the Contracting State of the habitual residence of the child, hence those having jurisdiction under Article 5, Article 9 of the Convention on Child Protection reads:

"(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either - request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or - invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child."

Article 8 of the Convention on Child Protection, on the contrary allows for transfers from authorities having jurisdiction under Articles 5 or 6.[469] It would seem that the process under Articles 8 and 9 would practically cause no difficulties in common law countries due to their familiarity with the *forum non conveniens* concept. It will have to been seen how the concept will be implemented in civil law countries.[470]

[466] Article 15(3) of Brussels II *bis*.
[467] Lagarde Report, *supra* note 116, p. 80.
[468] ibid, para 41.
[469] Article 8 of the Convention on Child Protection.
[470] The Convention entered into force, for instance, in Germany on 1 January 2011, in France on 1 February 2011 and in the United Kingdom on 1 October 2012; in the United States it has been signed but not been ratified.

Article 14 of the Convention on Child Protection sets forth that measures taken by an authority having jurisdiction pursuant to Articles 5–10 remain in force "according to their terms" even though

"*a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.*"

The exercise of parental responsibility is governed by the law of the child's state of habitual residence (Chapter III of the Convention on Child Protection). However, as a last resort, the application of this law can be refused if it would be contrary to public policy, taking into account the best interests of the child.[471] As provisions on the applicable law are totally absent from the Regulation, this chapter is free from comparison with the Regulation, but will of course nonetheless be relevant with respect to interrelations of the two instruments.

With respect to recognition and enforcement (Chapter IV of the Convention on Child Protection) there are quite a number of distinctions. Whilst discretion is significant in the Convention, all grounds of non-recognition are mandatory under the Regulation, as the distinction between Article 23 of the Regulation and Article 23(2) of the Convention on Child Protection demonstrates. If a judgment is incompatible with an order rendered later in the non-Contracting State of the child's habitual residence; this order may be recognised in the requested State, pursuant to Article 23 of the Regulation.

Both the Convention and the Regulation contain a public policy exception, however Article 23(a) of the Regulation provides that regard must be paid to the best interests of the child, a qualifier which is absent from Article 22 of the Convention.

Hence, the provisions of the Convention on Child Protection offer a higher degree of discretion to national courts which are not the courts of the habitual residence of the child, to accept or decline jurisdiction. The provisions contain a number of references to the 'best interest', in Article 8(1), as regards the

[471] Article 22 of the 1996 Convention.

general rule on jurisdiction, in Article 8(4), as an exception to the jurisdiction pursuant to Articles 5 and 6, in Article 9, in favour of a court 'better placed' to hear the case, in Article 10 with respect to the relation of the court competent for divorce and marriage annulment matters to have competence over parental responsibility matters. Further in Article 22 with respect to the public policy exception regarding the applicable laws and in Article 23 with respect to the public policy qualifier in the recognition and enforcement provision, in Article 33(2) with respect to the cooperation on a decision of placement. This brings us to the question of cooperation in the Convention on Child Protection.

Chapter V of the Convention on Child Protection reflects the compromise between a lose framework of cooperative measures and binding obligations for Contracting States; the duties of the Central Authority are defined in general terms only. Article 30 confirms that Central Authorities shall co-operate and provide information, whilst Article 31 adds that Central Authorities shall facilitate communications, agree on solutions and assist in locating children, but all the obligations set forth in Article 31 and the following articles are drafted in general words, with reference to situations rather than the exact procedures to be taken. In this respect the Convention resembles the provisions of the Regulation. The Lagarde Report notes that there is "no obligation to give information or to co-ordinate in advance the taking of measures […]".[472]

Hence, the Convention on Child Protection covers a wide range of orders about children, including parental responsibility orders, and provides rules governing which Contracting State's courts will have jurisdiction. With regard to the applicable law, the general rule is that each Contracting State should apply its own law with exceptions set forth in Articles 15–22 of the Convention on Child Protection.

As far as recognition and enforcement are concerned, there are some circumstances in which recognition can be refused, as in Art 23, the Convention makes clear that the procedure for enforcement should be 'simple and rapid'.

[472] Lagarde Report, *supra* note 116, para 137.

In the UK, the provisions of the Convention on Child Protection were implemented via secondary legislation, the Parental Responsibility and Measures for the Protection of Children.[473]

II. The interrelation with the Regulation

As was explained in detail in the introduction (Chapter 1), the interaction of the Regulation is addressed to evaluate the situation of conflicting provisions and to establish if there are complications and if there could be enhancements, thereby allowing for swift, fair proceedings.

According to Article 61(a) of the Regulation - in consistency with Article 52(2), (4) of the Child Protection Convention, which allows the Member States to apply the provisions of Community law to children whose habitual residence is in the Community, the Regulation - not the Convention on Child Protection - is to be applied if the child concerned has his or her habitual residence in a Member State.[474]

If the child habitually resides outside the State where a matrimonial matter is pending, Article 12(1) and (2) of the Regulation applies. However, it only applies to courts exercising jurisdiction under Article 3 of the Regulation. Since the provision not only applies to children resident in a Member State but also to children resident in third states, it remains uncertain whether Article 12(1) of the Regulation or Article 10 of the Convention on Child Protection applies if the

[473] Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010.

[474] Article 59(1) of the Regulation states: "Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation."; Article 61 of the Regulation states: "As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply: (a) where the child concerned has his or her habitual residence on the territory of a Member State; (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention."

child is resident in a contracting state to the Convention.[475] Respecting Article 61 of the Regulation, Article 10 of the Convention on Child Protection should take precedence over Article 12 of the Regulation in such a situation.[476] If 12(4) of the Regulation does not apply since the child is not habitually resident in a Member State or a contracting state to the Convention on Child Protection, it would be in line with the Regulation and 1996's stated aims to follow a procedure which is in the best interest of the child and to avoid inconsistencies resulting from the parallel application of Brussels II *bis* and the Convention. As has been mentioned with regard to the provisions of Brussels II *bis*, 12(3) of the Regulation offers the possibility for the courts of a Member State to hear a parental responsibility case though the child lives in a third state. This appears to suggest that Article 12(3) of the Regulation takes precedence over Article 10 of the Convention on Child Protection. The application of Article 61 the Regulation, which provides for the recognition and enforcement of a judgment given by a Member State court on the territory of another Member State where the child concerned had his or her habitual residence, raises several questions:

Is the matter at all covered by Brussels II *bis*? Where is the child concerned habitually resident? If the recognition or enforcement of a decision issued by a court in another Member State is at issue, as applicable law is not covered by Brussels II *bis*, do the applicable law provisions of the Convention on Child Protection apply to cases concerning parties in those Member States which are also contracting states to the Convention?[477]

As far as the second question is concerned – where is the child habitually resident? The Lagarde Report states that habitual residence "has to be determined by the relevant authorities in each case on the basis of factual

[475] Schuz, R., 'In search of a settled interpretation of Article 12(2) of the Hague Child Abduction' (2008) CFLQ 64, 20(1), 64-80.
[476] Schulz, A., 'Guidance from Luxembourg: first judgment clarifying the relationship between the 1980 Convention and Brussels II Revised' (2008) IFL, December, 221-225.
[477] Lowe, N., 'The 1996 Hague Convention on the Protection of Children', 1st edition, 2012, section 1.43.

elements". As was mentioned it underlines that it is "an autonomous concept".[478]

A reference to the extensive case law under the Convention on Child Protection seems not desired rather, the Lagarde Report emphasises that under the Convention on Child Protection the role of habitual residence is to assess which Contracting States have jurisdiction to take measures of protection and whether decisions should be recognised and enforced in other Contracting States.[479] Hence, the approach is more similar to the approach of the Regulation.

Now considering that during the last years, the European instruments have demonstrated an EU-centred approach vis-à-vis the existing and the newly introduced conventions which is evident in the wording that the Regulation shall "take precedence" over certain instruments, with regard to matters governed by the Regulation[480], it seems that this dominance is overwhelming with respect to the Convention on Child Protection. As was mentioned above, Article 61 of the Regulation states that in relations between the two instruments the Regulation shall prevail if the child concerned has his/her habitual residence on the territory of a Member State. It remains unclear which takes precedence where a child is without any habitual residence but is present in a Member State. The implications of a situation like this once again makes evident that jurisdiction is not a formality and the forum may have significant consequences for the proceedings. Article 61(a) also has the consequence of excluding the application of Article 7 of the Convention where a child habitually resident in a Member State is wrongfully removed to or retained in another Contracting State.

The prevalence set forth in Article 61 of the Regulation only applies to jurisdiction as provided for in Articles 5 to 14 of the Convention and provisions in respect to recognition and enforcement found in Articles 23 to 28 of the Convention. It does not operate in respect to Articles 15 to 22 of the Convention

[478] Lagarde Report, *supra* note 116, Para 40, para 4.5.
[479] ibid, para 13.73.
[480] Article 60 an Article 62(1); as mentioned, Art 52(1) of the 1996 Hague Convention in contrast provides that the Convention shall not affect any international instrument to which Contracting States are Parties and which covers matters governed by the Convention, unless a contrary declaration is made by the State Parties to such instrument.

as the Regulation remains silent on the applicable law. The Convention refers to applicable law in Article 15(1) in connection with Article 21(1), which provides that the authorities shall apply their own law *lex fori* and in accordance with 15(2) as an exception the law of another State if there is a close connection of the case to this state. If the child changes the habitual residence to another state, the law of the other state is to be applied pursuant to Article 15(3). Hence, the principle of *perpetuatio fori* does not apply. This principle favouring the prevailing rights of the state of habitual residence is so prominent in Article 15 that it may be assumed that it can also be applied when jurisdiction is determined by the Regulation.[481]

On the other hand, as the Guide to Regulation points out, given that the applicable law provisions of the Convention on Child Protection fall outside the Regulation, they can apply.[482] Accordingly, in the context of abduction, in determining whether there has been a wrongful removal or retention in breach of rights of custody (technically for the purposes of Art 2(11) of the Regulation, rather than Art 3 of the 1980 Convention), regard should be had to Art 16(3) and (4) in the same way as previously discussed in connection with the Convention on Child Abduction.

As was explained and will be explained in the analyses on habitual residence[483], the Regulation and the Convention are generally supposed to take a child-centred approach.[484] An exception are Articles 12 of the Regulation and Article 10 of the Convention on Child Protection pursuant to which the state of the divorce or the state to which the child has an essential connection may have jurisdiction with the agreement of the parents and if this is not in collusion with

[481] Pirrung, J., in Pirrung, J./Henrich, D. in J. von Staudinger *Kommentar zum Bürgerlichen Gesetzbuch: BGB - EGBGB/IPR Einführungsgesetz zum Bürgerlichen Gesetzbuch/IPR*, Vorbem C–H zu Art 19 EGBGB (Internationales Kindschaftsrecht 2), Munich 2009, Vorbem. zu Art. 19 EGBGB Rn C 216; Putzo/Hüßtege, *Zivilprozessordnung, Kommentar*, Munich 2011, Art. 3 EuEheVO Rn. 4; Rauscher, T., *Europäisches Zivilprozess- und Kollisionsrecht: Rom I-VO, Rom II-VO*, Munich 2011, Art. 3 EuEheVO Rn. 13.

[482] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 8.3.1.

[483] Chapter 2 A I 1; 3 A II 1 and 3 A III.

[484] Schulz, A., 'Inkrafttreten des Haager Kinderschutzübereinkommens v. 19.10.1996 für Deutschland am 1.1.2011', FamRZ 2011, 156, 159; Borth, H., 'Nacheheliche Solidarität als weiteres Billigkeitskriterium zur Begrenzung bzw. Befristung des nachehelichen Unterhalts nach § 1578b BGB' (2011) Fam RZ, 153.

the best interests of the child.[485] The general principle is that only one state has jurisdiction for the main proceedings (Article 13 of the Convention)[486] and that in urgent case the courts can take protective measures as was referred to in the previous chapters (Article 20 of the Regulation and Article 10 of the Convention on Child Protection).

In contrast to Article 10 of the Convention on Child Protection, Article 12 of the Regulation provides that proceedings started on the basis of prorogation can be finished even when the proceedings on divorce have been closed with a legally binding decision. It can be concluded that the Regulation prevails over the Convention in relations between Member States in matters covered by the Regulation and hence the Regulation prevails in matters of jurisdiction, recognition and enforcement.

How does the reference to applicable law work? Interaction is created by the operation of the Convention's applicable law rules within the European Union. Article 62 of the Regulation states that the Convention shall continue to have effect with regard to matters not governed by the Regulation. However, in contrast to the provision on parental responsibility in Article 16, Article 15(1) determines that the general rule applies if authorities are exercising jurisdiction 'under the provisions of Chapter II'. To complete the set of questions on the interaction, it is not clear whether Chapter V of the Convention is not applicable where a child was habitually resident in a Member State.

Article 15 paragraph II provides the court with a certain flexibility to apply the law of another state or to consider the law to which the circumstances of the case have a closer connection (substantial connection, Article 15(2)), an opportunity should however only be applied in exceptional cases. Article 15 applies when a court is acting in accordance with the Regulation only. Only this interpretation of the Convention text is in accordance with the proclaimed aim.

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[485] Coester-Waltjen, D., 'Die Berücksichtigung der Kindesinteressen in der neuen EU-Verordnung „Brüssel II a"' (2005) FamRZ, 241.
[486] ibid.

To explain this, a more detailed analysis of Article 15(3) which refers to a change in the child's habitual residence to another Contracting State is helpful.

If a change in circumstances has removed the jurisdictional basis upon which the measures of protection were originally taken, Article 14 provides that measures which have been taken pursuant to Articles 5-10 of the Convention will remain in force, provided those measures have not been modified, replaced or terminated. Hence, for instance, if there is a change in a child's habitual residence after such measures of protection were taken, the measures ordered by the courts in the contracting state where the child was habitually resident before will remain in force in the other contracting state until they are modified or terminated.

Article 15(3) incorporates a presumption that the way in which such measures are applied may differ pursuant to the law of the Contracting State of the child's original habitual residence and the law of the new habitual residence. As of the time of change, the conditions of application of any measures of protection are governed by the law of the new Contracting State of habitual residence, from the time of the change. The Lagarde Report cites the example of a guardian who is required to seek judicial authorisation before taking certain actions under the law of the child's previous Contracting State of habitual residence but would not be required to do so under the law of the new Contracting State of habitual residence.[487]

It should not be neglected that the Convention on Child Protection was drafted roughly simultaneously with the drafting of Brussels II and the concerns in regards to their co-existence were reflected in a Minute of the Proceedings of the Hague Conference:

"the question of the relationship with Brussels II had concerned the permanent Bureau from an early stage in the work on the present Convention." [488]

[487] Lagarde Report *supra* note 116, page 575.
[488] Hague Conference, Proceedings of the XVIII Session: Protection des enfants, Minute No. 10, p.355, discussions also concerned Article 10 and 52.

The caprices of European politics made the Convention on Child Protection a difficult project from the start with the only benefit that it was able to enter into force simultaneously for then eighteen of the nineteen remaining Member States which were not already a contracting Party.[489] It has had a difficult start with rare case law in Europe and limited 'open' conflict with the Regulation. It is mostly to this development that the interrelating rules and situations of the Regulation have been those related to the Regulation correlation with the Convention on Child Abduction rather than with the Convention on Child Protection. It remains to be seen how the potential for interaction will realise.

C. Conclusion

Chapter 3 has compared Brussels II *bis* with the two Hague instruments, first as a consideration of the rules directly addressing the interrelation and complementary scope and beyond this scope, as an analysis of the rules which are relevant for the interrelation. Such analysis of the ECJ's decisions have demonstrated that the judgments of the ECJ have clarified the relationship between the Regulation and the Convention of Child Abduction but only with respect to certain aspects, not entirely with respect the grave risk exceptions and the specific procedural difficulties arising from the mechanism of return orders and non-return oders. This chapter has also revealed that the concept of the 'best interests' of the child is explicitly incorporated in the rules of the Regulation but only to a limited and indirect extent in the Convention on Child Abduction. Case law on the Convention on Child Abduction during the last decades has made evident that the discretion incorporated in the rules is considerable as to the determination of a grave risk and the underlying concept in Articles 13 (a) and (b) in the Convention and Articles 11 and 15 in the Regulation.

Heretofore the analysis of the relation of and interaction between the provisions on enforcement in Brussels II bis and the Convention on Child Abduction has

[489] Lowe, N., *supra* note 477, p. 10.

made evident the difficulties of the interrelation of the well-established legal instrument with the new rules on return orders in the Regulation. The different approaches of the US and the English courts have further made clear that habitual residence under the Convention has be interpreted in a way supporting the child's best interest and in other cases in the context of the Hague Convention some interpretations have allowed for the assumption of habitual residence at a place which may not necessarily be in his/her best interest.

A clearer definition of the requirements for the acquisition of habitual residence is a central if not the central aspect in the framework of the interaction of the Convention on Child Abduction and the Regulation in the context of return orders and the enforcement of orders in accordance with the complementary rules of the Convention and the Regulation.

Under the Regulation, pursuant to the case law of the ECJ in particular in Proceedings brought by A and Mercredi[490] the concept of determining habitual residence is characterised by a remaining degree of discretion together with a set of criteria providing legal certainty and requiring the national courts to undertake a careful consideration of the factual conditions of the instant case. The lack of a consistent interpretation under the Convention has "undermined its value as a vehicle for ensuring the return of children wrongfully removed or retained in the international setting."[491] Over the years, some judges began to utter doubts that parental intention should be allowed to prevail over factual considerations but the high degree of insecurity remained.

The same applies to the structural concept of Articles 12 and 13 of the Convention on Child Abduction. The exceptions to the obligation to order return set forth in Article 13 have been interpreted with high discretion throughout the past decades and the lack of clarity on what a settlement of the child in the "new environment" is supposed to be results from Article 12 not having been subject to appeal court case law. In this context it has become evident that the high

[490] Mercredi, *supra* note 130.
[491] Silberman, L., 'Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence', (2006), New York University Public Law and Legal Theory Working Papers, Paper 18.

discretionary power of the courts with respect to return order concept and the grave risk exceptions have led to situations which cannot be assumed in the best interests of the children concerned. Different contracting states' legal systems have developed a different understanding of ‘undertakings' as set forth in Article 13(b) of the Convention as well as of the criterion of grave risk.

Whilst the superseding character of the Regulation set forth in Articles 59 (1) and 62 (1) of the Regulation clarifies that the Regulation does not only have priority over the Convention on Child Abduction but replaces it in general, the complementary character Article 11 has turned out to trigger complications.

To this extent, in any respect there is no ultimate replacement and Article 11 of the Regulation clearly sets the ground for an interaction.

In the context of this complementary structure, in the Appeal Court cases which dealt with both Article 11 of the Regulation and Article 13 of the Convention the issue was the hearing of the child rather than the overriding nature of Article 11(6–8) and Article 41 of the Regulation (automatic enforcement) over non-return orders based on Article 13 of the Convention. However, in the following chapter, the general prevailing character of the provisions of the Regulation in intra-community cases over the application of the Convention provisions will be addressed.

The interrelation of Article 11 of Brussels II bis with the requirements of return orders on the basis of the Hague Convention, is complemented by the further interrelation of Article 13(2) permitting a court to refuse to render a return order if the child who is old and mature enough to do so, with Article 11(4) of the Regulation, pursuant to which a court is not permitted to refuse the return if there is proof that adequate measures have been taken to secure the protection of the child after the return.

Article 11(4) of the Regulation has been very rarely referred to at all in the courts whilst Article 11 (6)-(8) has been prone to interpretation.[492]

[492] Matter of LC, supra note 439.

The Practice Guide's assumption that the "rules of the Regulation (Article 11(2) to (5)) prevail over the relevant rules of the Convention" have not been reflected in practice. It has very much been a complementary approach, with a priority of the application of Article 13 of the Convention and it remains to be seen how the primacy of the Regulation will be enforced with regard to non-return orders based on Article 13 of the Convention as those orders may be overridden by Article 11(6–8) and Article 41 of the Regulation (automatic enforcement). In the following chapter this will be analysed.

As to the Convention on Child Protection this chapter has analysed that there is no interaction as such. Whilst there is clarity that the provisions of the Regulation are to be applied to children whose habitual residence is in the Community, as the analysis has shown, there is considerable unclarity if the child habitually resides outside the State where a matrimonial matter is pending, when Article 12(1) and (2) of the Regulation applies and the same applies to Article 12(4) of the Regulation.

Chapter 4 (Non-)Return orders, Recognition and Enforcement

As the analysis in the preceding chapter has indicated, enforcement and recognition in the Regulation are particularly relevant in the context of the interrelation with the Convention on Child Abduction. Hence, the provisions will be analysed in the setting of the case-law and in official reports so as to review their procedural suitability and potential to protect the child's best interests. Further, the chapter will analyse the ECtHR's suggestion that it has the function of a reviewing court and will consider the ECtHR's decisions on the interpretation of Brussels II *bis* and the Convention on Child Abduction. Owing to the fact that return orders were particularly prone to involvement by the ECtHR it will further be assessed whether and how the influence of the ECtHR has an impact on national case-law and the interpretation of the Regulation. In the context of recognition and enforcement the analysis will seek to determine whether 'mutual trust' has worked and what significance mutual trust has for a proper functioning of the Regulation in the 'best interests' context. It will further analyse the potentially overriding mechanism of Article 11 of the Regulation in relation to 13 of the Convention of Child Abduction.

A. Recognition and enforcement – an introduction

As was explained in the chapter on the background of the Regulation[493], the Regulation seeks to invoke "complete automatic enforcement" of decisions reached in different jurisdictions.[494]

Notwithstanding the already existing advanced degree of recognition and enforcement tools, the European Council in Tampere[495] called for the further reduction of the intermediate measures required to enable the recognition and enforcement of a decision or judgment in another Member State, including

[493] as discussed in Chapter 1 B herein.
[494] Preamble of the Regulation, Recital (12).
[495] Tampere Conclusions, *supra* note 56.

decisions in the field of cross-border family law. Pursuant to the Tampere Conclusions such decisions would be

"*automatically recognized throughout the Union without any intermediate proceedings or grounds for refusal of enforcement."*[496]

In recital 21 of the Preamble of the Regulation it is claimed that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and that the grounds for non-recognition should be restricted as much as possible.

Pursuant to Articles 40 and 41 of the Regulation, access rights are directly recognised and enforceable under the Regulation so as to

"ensure that a child can maintain contact with all holders of parental responsibility after a separation even when they live in different Member States".[497]

Under the provision the application for an "exequatur" is no longer required and it is not possible to oppose the recognition of the judgment. On the other hand, the provision allows holders of parental responsibility to seek recognition and enforcement of a judgment by applying for exequatur pursuant to Article 40(2) of the Regulation. In Chapter III, Article 21 provides for recognition of judgments, subject to the defined grounds for non-recognition laid down in Article 23 and Article 28 refers to the enforcement of judgments in another Member State when the judgement has been declared enforceable. In this case the Member State making the order must, upon request of the party seeking enforcement, issue an Annex II certificate to enable enforcement pursuant to Article 39 of the Regulation. For decisions as laid down in Article 11 following a non-return order, the Member State must issue a certificate to enable enforcement pursuant to Articles 40 and 41 of the Regulation. Pursuant to Article 46 authentic instruments may be recognised and declared

[496] ibid, para 34.
[497] Practice Guide on the application of the Regulation (2005), *supra* note30, p.24.

enforceable.[498] This general enforcement procedure does however not apply to protective measures as of the scope of Article 20 in cases where the Member State did not otherwise have jurisdiction.[499]

In the Convention on Child Protection, the system on recognition and enforcement differs considerably. The measures taken by the authorities of a Contracting State to the Convention on Child Protection must be recognised by operation of law in all other Contracting States, unless one of the exceptions in Articles 23 of the Convention on Child Protection applies. Article 23 sets forth the grounds for refusal of recognition.

Article 24 of the Convention on Child Protection adds flexibility by providing that a request may be issued by any person to the competent authorities of a Contracting State requesting them to decide on the recognition or non-recognition of a measure taken in another Contracting State, such a procedure being governed by the law of the requested State. Article 28 makes provision for enforcement in another Contracting State and requires that,

"Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State […] taking into consideration the best interests of the child."[500]

However, the Regulation prevails over the Convention on Child Protection pursuant to Article 61 with regard to the recognition and enforcement provided for in Articles 23 to 28 of the Convention on Child Protection. Hence, as far as the recognition and enforcement within the ambits of the Member States is concerned, no regard must be given to the respective provisions of the Convention on Child Protection.

As was discussed in the chapter on the return mechanism, in the Convention on Child Abduction there is no automated recognition approach as in Article 42 of

[498] ibid, a definition of "authentic instruments" is provided in the CJEU case, Case C- 260/97 *Unibank A/S v Flemming G. Christensen* [1999] ECR I-3715 of 17th June 1999.
[499] *Purrucker I*, *supra* note 215, as discussed in Chapter B.I.
[500] Article 28 of the Convention on Child Protection.

the Regulation.[501] In direct comparison, recognition may be considered one of the real weaknesses of the Convention on Child Abduction and the return order provisions are provisions on the exceptions to enforce decisions, not provisions on recognition. In the Convention on Child Abduction the judicial or administrative authority of a requested state is not bound to order the return of a child who has been wrongfully removed or retained if the person, institution or other body which opposes the child's return establishes that:

"the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"

or

"there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[502]

Whilst it may seem that this allows for exceptions in several situations, the courts have been hesitant in giving effect to these exceptions.[503] Hence, in contrast to the ultimate Character of Article 42 of the Regulation, Article 13 of the Convention on Child Abduction is more 'flexible' but also allows for a more individual consideration of the circumstances. But the issue is more complex than this, as will be seen in the subsequent assessment on Article 11(8) of the

[501] As discussed in Chapter 3 A IV hereof.
[502] Article 13 a) and b) of the Convention on Child Abduction.
[503] *K v K* (child abduction) [1998] 3 FCR 207; *Re S* (a minor) (abduction) [1999] 2 FCR 541, sub nom *Re S* (abduction: return into care) [1999] 1 FLR 843; *Re L* (abduction) [1999] 2 FCR 604, [1999] 1 FLR 433). See also *TB v JB* (abduction: grave risk of harm) [2001] 2 FCR 497, [2001] 2 FLR 515; *Re E* (children) (exceptions to return) [2011] 4 All ER 517, [2011] 2 FCR 419; *P v P* (child abduction) [1992] 1 FCR 468, [1992] 1 FLR 155; *Re S* (a minor) [1993] Fam 242, sub nom *Re S* (a minor) (abduction) [1993] 2 All ER 683, CA; *Re S* [2000] 1 FLR 454, [2000] Fam Law 234; *Re Y* [2013] EWCA Civ 129, [2013] 2 FLR 649; OLG Düsseldorf FamRZ 1994, 185; OLG München, FamRZ 1994, 1338; OLG Nürnberg, FamRZ 2007, 1588; Minister of Justice (E M) v J M, [2003] The Irish Reports 178; F v M (Abduction: Grave Risk of Harm), [2008] 2 Fam L Rep 1263; Jault-Seseke/Pigache, 'Contribution procédurale à l'efficacité de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants', Recueil Dalloz, 182(2006), no 26, chroniques, 1778-1783; Scherer, I., *Internationale Kindesentführungen und Kindeswohl*, FS Würzburg (2002) p. 319 ff.; Staudinger/Pirrung, *supra* note 481 Art. 19 EGBGB: „strenge Anforderungen" – high burden.

Regulation and in the analysis of cases decided on Article 13 of the Convention on Child Abduction.

In particular, as was discussed already in the context of the interpretation of Article 13 under the Convention on Child Abduction, a grave risk may not to be equated simply with considerations that the welfare of the child should be a primary concern[504]. Pursuant to Article 13 of the Convention on Child Abduction, the judicial or administrative authority may further refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.

Hence, the Convention on Child Abduction sets out a limited number of defences which, in certain circumstances, give the court a discretion not to order the child's return to its country of habitual residence in, particular in ordering the return of a wrongfully removed child.[505] With regard to returns, the Regulation aims at working even more advanced than the provisions of the Convention on Child Abduction by introducing greater automatismin the return of the child. In contrast to the Convention, which contains a non-ultimate presumption in favour of the return of the child, Brussels II *bis* reinforces such a presumption once a judgment ordering the return of the child has been issued in the Member State of habitual residence of the child prior to the wrongful removal or retention. The provisions on return in the Regulation are based on the concept of cooperation and cooperation under the Regulation bears finality as the cooperation between the courts takes place on the basis of a certificate (Annex IV to the Regulation), against which no appeal is permitted.[506] At least in theory, as discussed in the chapter on the interrelation of the Regulation and the Convention on Child Abduction[507], pursuant to Art 11(4) of the Regulation, a court cannot refuse to return a child on the basis of the Convention if it is established that adequate arrangements have been made to protect the child

[504] *DT v LBT*, *supra* note 312.
[505] Scherer, I., *supra* note 503, p. 319 ff.; Staudinger/Pirrung, *supra* note 481, Art. 19 EGBGB: „strenge Anforderungen“ – high burden.
[506] Article 43(2) of the Regulation.
[507] As discussed in Chapter 3 A V herein.

after the return. Further pursuant to Article 11(5) a court cannot refuse return unless the person who requested the return of the child has been given the opportunity to be heard.

Certainly, the degree of automaticity the Regulation incorporates is based on the concept of mutual recognition based on a high level of mutual trust among Member States. The degree of automaticity incorporated in Brussels II *bis* with regard to cooperation in cases of child abduction is based on the presumption that the authorities of the Member State of the habitual residence of the child prior to the removal can always provide arrangements which respect the best interests of the child and that the exceptions to enforce an order which are set forth by the Regulation can strengthen the exceptions set forth in the Convention.[508]

Where return is refused on the basis of one of the exceptions in Article 13 of the Convention on Child Abduction, the courts of the Member State of habitual residence prior to the abduction retain jurisdiction and a subsequent decision by these courts ordering return will prevail over the refusal to return (Article 11 (8) of the Regulation). Those decisions are subject to enforcement in the requested State without the need for a declaration of enforceability, provided that certain set forth in Article 42 of the Regulation are met. This provision contains the underlying principle that the requested State does not acquire jurisdiction immediately after a refusal to return and that the State of habitual residence prior to the wrongful removal or retention retains jurisdiction, as it is set forth as the general concept in the Regulation, including the provisions on child abduction in Articles 10, 11 and, in directly, Articles 12 and 15. Under the Regulation the requested State is obliged to send, within one month, a copy of the non-return order and of the relevant documents to the authorities of the State in which the child was habitually resident immediately before the wrongful removal or retention (Article 11(6) of the Regulation). Pursuant to Article 11(7) of the Regulation, the respective authorities must then notify the parties of their right to make submissions to the court of the State of habitual residence within

[508] As discussed in Chapter 3 A V herein.

three months. In the next chapter it will be analysed in detail how the structure of interrelation of Article 11 (6-8) of the Regulation and Article 13 of the Convention on Child Abduction has turned into an interaction rather than a smooth relationship.

B. The enforcement of child return orders – improvement or disorder

I. 'Overriding' Hague child return orders

In the previous, the general interrelation of the Regulation with regard to the Convention in the particular context of Article 11 of the Regulation and Article 13 of the Convention was assessed.[509] In the following, it will be considered in more detail how return orders were particularly prone to an interaction of the Convention on Child Abduction and the Regulation in Article 11(6-8) and then, afterwards, how the ECtHR's approach has influenced such interaction.

During the last years, the ECJ has enforced the primacy of Brussels II *bis* (and, as a 'side effect', the Convention on Child Protection, as will be explained in more detail) over the Hague Convention on Child Abduction with regard to non-return orders based on Article 13 as those orders may be overridden by Article 11(6–8) and Article 41 of the Regulation (automatic enforcement).[510]

In *Re D*[511], proceedings brought by a father under Article 11(8) of the Regulation for the return of his child following an application under the Convention on Child Abduction for return of the child possibly abducted to Poland, the Polish court refused to order the return, building its arguments on Article 13(b) of the Convention. Why this such an exemplary national case. As was already mentioned in various chapters dealing with *Mercredi*, *Mercredi* made evident that under the present rule, a parent in a case which may be subject to the Regulation should seek orders at the earliest opportunity if there

[509] As discussed in Chapter 3 A V hereof.
[510] *Bradbrooke, supra* note 429.
[511] *Re D (A Child)* [2011] EWHC 471 (Fam), [2011] 2 F.L.R. 464, [2011] Fam. Law 571.

is a risk of a removal from the jurisdiction. This is not because of a weakness of the Regulation itself, with its very limited degree of discretion but only because the French court only applied the Convention; due to the degree of discretion granted to the courts with respect to return orders under the Convention, the case turned into a demonstration of legal uncertainty under the Convention. Had Mr Chaffe directly sought orders he would have established rights of custody prior to removal and the French court would have ordered the return. Hence, it seems at first sight, to be practically effective the procedure under the Regulation most importantly requires speed. As Lowe noted the ECJ recognised in *Rinau* the obvious need for speed to avoid damage to the relationship between the child and the left-behind parent. But why are those who are confronted with a possible abduction situation need to issue proceedings as quickly as possible thereby seeking custody orders and avoid proceedings at a court in another Member State. A court should as quickly as possible be found and the proceedings should endow a court to decide on rights of custody. The series of cross-actions in France and the United Kingdom made it necessary for the Court to distinguish between the judgment of a court ordering the non-return of a minor under the Convention and the question of attribution of parental responsibility for this minor. For this purpose the order denying the return was to "have no effect on judgments which have to be delivered in that other Member State in proceedings relating to parental responsibility which were brought earlier and are still pending in that other Member State".

Back to *Re D*, the proceedings brought by a father under Article 11(8) of the Regulation, for the return of his child following under the Convention on Child Abduction for return of his child. The Polish court had refused to order the return and based its judgment on Article 13(b) of the Convention. The English judge then argued that there is nothing in the provisions in the Regulation which indicates jurisdiction in England is in some way restricted and that the court could order a summary or interim return of the child under Article 11(8) of the Regulation. She referred to the ECJ's reasoning in *Povse* that the objective of the provisions of Articles 11(8), 40 and 42 of the Regulation, that the proceedings should be expeditious and that the priority should be given to the jurisdiction of the court of origin are in conflict with any interpretation "according

to which a judgment ordering return must be preceded by a final judgment on rights of custody."[512]

Zarraga helped to clarify the interaction of the Convention and the Regulation with respect to return orders and non-return orders. In *Zarraga*[513] the Court of Justice confirmed that Article 11(8) operated to 'override' an order of non-return made pursuant to Article 13 of the Convention on Child Abduction. It was already mentioned that Mr Zarraga had brought proceedings in Germany to obtain the return of the child to Spain under the Hague Convention. The German court argued there had been violation of a fundamental right in not hearing the child before making a decision and requested a preliminary ruling as to whether it could refuse to recognise the Article 42 certificate.[514] In the European Union, the Charter on Fundamental rights of the European Union has the same legal force as the Treaties,[515] however its impact in the framework of European legislation is still uncertain[516] In *Zarraga*, the European Court of Justice was provided with the question whether the court in a Member State may review the compatibility of an order for the return of an abducted child which was ordered by a court in another Member State, with the Charter.[517]

The European Court of Justice emphasised the continuing jurisdiction of the State of the former habitual residence of a child on the merits of custody and also the obligation of other Member States to enforce a return order made and certified by the courts of that State after a Hague return application has been denied in the other State. Pursuant to this judgment, challenges against the return order, its enforceability as such or against the certificate issued pursuant to Article 42 of the Regulation must and may only be before the courts of the State of former habitual residence.[518]

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[512] ibid.
[513] *Zarraga v Pelz*, *supra* note 444.
[514] *Zarraga v Pelz*, *supra* note 444.
[515] Article 6(1) of the Treaty on the European Union.
[516] Leczykiewicz, D., '"Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts be Empowered to Review EU Secondary Law?' (2010) 35 European Law Review 326-348.
[517] *Zarraga v Pelz*, *supra* note 444.
[518] ibid.

Zarraga was a primary example not only of the extent of automaticity in Article 11. It was also an example of mutual recognition and the limits of mutual trust required under the Regulation and of the practical difficulties caused by the primacy of the Regulation over the Convention on Abduction. As mentioned, in essence, this case concerned the extent to which the national courts were entitled to review the judgment they were asked to enforce. The Higher Regional Court (Oberlandesgericht Celle) in Germany had questioned whether the court asked to enforce an order may exceptionally review it if the judgment to be enforced issued in the Member State of origin appears to contain a serious infringement of fundamental rights pursuant to the Charter in the meaning of Article 42 of the Regulation. The second question referred to the Court of Justice was whether the obligation to enforce the judgment remains in force even if the certificate issued by the court of the Member State of origin under Article 42 contains a declaration which is demonstrably inaccurate.[519]

Considering quick action a key part of any effective response to wrongful removal or retention of children and to ensure the return of children to the place of their habitual residence, the Court argued that pursuant to the Regulation the former court of habitual residence retains exclusive jurisdiction to decide whether the child is to be returned, even if there is a conflict of opinion between the court where the child is habitually resident and the court where the child is wrongfully present.[520] The court noted that recital 17 in the Preamble to the Regulation sets forth that the execution of a judgment entailing the return of the child must take place without any special procedure being required for the recognition or enforcement of that judgment in the Member State where the child is present.[521] Referring to *Rinau* and *Povse*, the Court argued that it follows from Articles 42(1) and 43(2) of the Regulation, in view of recitals 17 and 24 in the Preamble that a judgment ordering the return of a child by the court with jurisdiction pursuant to the Regulation, as it is enforceable and the certificate referred to in Article 42(1) in the Member State of origin has been

[519] ibid.
[520] ibid, para 44.
[521] ibid, para 45.

issued, is automatically enforceable in another Member State. It denied there was a further opportunity for the enforcing court to review the validity of the order and to object to the recognition.[522] It further concluded that no further appeal against the issuing of a certificate pursuant to Article 42 of that Regulation, other than an action within the meaning of Article 43(1) of the Regulation, is permitted, even in the Member State of origin. The Court held that "questions concerning the lawfulness of the judgment ordering return as such must be raised before the courts of the Member State of origin", in accordance with the rules of that legal system.[523] The court's ultimate conclusion is that the court supposed to enforce has no power to oppose either the recognition or the enforceability of the judgment.[524]Such automatic mutual recognition shows the Court's presumption that the courts involved in the framework of Brussels II *bis* respect, within their respective areas of jurisdiction, the obligations which the Regulation imposes on them and trust in the orders and judgements of the national courts of another Member State.

This presumption however disregards the existing mistrust between courts of Member States which has been displayed in many of the enforcement and recognition cases discussed in the previous chapters.[525] Whilst this ultimate character of the decision by the national courts seems laudable to enhance an harmonised functioning of the Regulation, the Court's arguments in *Zarraga* disregard that theory (the application of the Regulation) and practice (the application of the Regulation as suggested in the ideal situations envisaged in the Practice Guide are not the same and that the Member States' courts were very familiar with the return mechanism in the Convention but would have difficulties in additionally applying the Regulation. Adaptions of the legal system of each Member State were required to ensure that the Regulation is applied in a manner which respects the fundamental rights of the child and the assumption

[522] ibid, para 48.
[523] ibid, para 51.
[524] ibid, para 56.
[525] Reference in Case C-4/14, *Bohez v Wiertz*, reinforced the statement by the court in *Zarraga v Pelz* "That scheme is based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at EU level".

of mutual trust in the decision of another Member State requires a flawless application of the Regulation's rules.

On the one hand, it seems that such automatism[526] disrespects that decision-making in complicated cross-border abduction cases is not necessarily flawless and that such non-availability of corrective control by the other court makes it difficult to argue that enforcement would by any means always be in the best interest of the child concerned.[527] As long as there is mistrust of one national court towards the decision of another national court in intra-EU cases, it is hard to imagine that courts would flawlessly deal with cases which require the primacy of an order pursuant to the Regulation, without the discretion to review. These findings accord with the outcome in the two cases discussed in this thesis: *Zarraga*[528] and *Povse*[529]*.* Despite clear rulings from the Court of Justice that the orders should be enforced and the children returned, in both cases the children were not returned to the state of origin. Considering the difficulties surrounding the Article 11(8) process, the lack of enforcement of such orders question the suitability of the process.

In *Sneersone* and *Kampanella v Italy*, the Member State of enforcement even brought an action against Italy before the Commission under the former Article 227 EC. It is not surprising that the Commission presented arguments very similar to the Court's reasoning in *Zarraga* by stating that national authorities should retain wide discretion as to how to implement the principle of hearing a child's opinion.[530]

Whilst the judgements in those cases were strict as to enforcement under the Regulation, it seems that the ECJ at the same time recognised how hard it has proven to the national courts to apply Article 11 (6)-(8). Walker and Beaumont

[526] Para 40 of *Bradbrooke, supra* note 429 confirmed the ECJ's position in *Zarraga v Pelz supra* note 444: "it is apparent from Article 11(3) to (5) of the Brussels II *bis* Regulation that the return without delay of the child is to be the general rule and that a refusal must remain the exception. Consequently, in the system established by the Brussels II *bis* Regulation, unlike that arising from the 1980 Hague Convention, where the courts concerned oppose return, that does not automatically bring the dispute concerning the return to an end."
[527] Walker, L., Beaumont, P., *supra* note 445.
[528] *Zarraga v Pelz supra* note 444.
[529] *Povse v Alpago, supra* note 244.
[530] *Sneersone and Kampanella v Italy*, Application No 14737/09, 12.10.2011, para 39-45.

criticise that the ECJ considered the certificate pursuant to Article 42 of the Regulation more significant than the hearing of the child.[531] But this criticism on the strictness of the Regulation's regime on return orders which has been discussed in detail in the context of this chapter disregards that the Regulation requires a very stringent consideration of the respective child's interests through the rules in Article 10 (b) (i) and (ii) and (iv) and 42 (2). It adds to legal certainty that the competent court of the Member State of the child's original habitual residence retains jurisdiction to order he return of the child under Article 10 and that the Member State to which the child has been abducted has to recognise and enforce the return order, unless the exceptions explicitly set forth in the Regulation are met. In *Re D* the English court held that the interrelationship of Articles 10 and 11(7) and (8) of the Regulation allow the state from which the child has been wrongfully removed or retained to assess the custody of the child once a judgment of non-return pursuant to Article 13 of the Convention has been made.[532] It further underlined that proceedings under Article 11(7) should be carried out as quickly as possible with the court exercising a welfare jurisdiction in carrying out the required examination. As such, it held, the child's welfare is the paramount consideration.

The Judge noted that the court could in fact order a summary or interim return of the child under Article 11(8) prior to a final determination of custody issues. However, she further noted that if the court decided to order the return of the child pursuant to Article 11(8), the return must be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin pursuant to Article 42(2). This reflects how much the Regulation has contributed to legal certainty and clarity, which in the author's view clearly is in the interest of an abducted child.

In *Re D*, having considered the father's evidence that his drinking was not as extensive as alleged by the plaintiff and that he had played a significant role in

[531] ibid.
[532] *Re D, supra* note 511.

his child's care prior to her retention in Poland, the court issued a certificate for return pursuant to Article 42(2), concluding that this was in the best interest of the child. The guardian had obtained the child's views.[533]

Theis J took account of several previous English cases and of *Povse*[534], the consistent aspect of which was that the courts exercised a welfare jurisdiction. This was in accordance with the ECJ's ruling that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of Article 11(8), even if it is not preceded by a final judgment of that court relating to custody rights. National courts should make efforts to hear the child regardless of the behaviour of the abducting parent. In *Re D*[535] the abducting parent even failed to co-operate with the guardian even when the guardian visited the state to which the children had been removed. This causes unintended delays. However if the court allowed the parent's lack of co-operation to influence the case, and not order a return since the parties have not been heard it neither seems a valuable solution. Consequently the court of the former habitual residence will often have a difficult task in Article 11(8) proceedings, to proceed in the best interests of the child(ren) concerned.

The overriding and ultimate character of the automatic enforcement mechanism of the Regulation has not only been criticised by Beaumont and Walker. Others argue that the ECJ has been too formalistic in its interpretation of the rules of the Regulation and has relied too much on the hardly existent mutual trust between the Member States.[536]

[533] ibid.
[534] *Povse v Alpago, supra* note 244
[535] *Re D, supra* note 511.
[536] McEleavy, P., 'The Movement of Children in Europe: Mutual Trust, Distrust and Human Rights' (2013) IFL, 172-175.

II. Hearing of the Child

As has been discussed before[537], the child's right to be heard in proceedings concerning him or her are a central part of the provisions (Articles 23, 41, 42 and 11(2) of the Regulation).

Article 11(2) of the Regulation requires a child of an appropriate age and maturity to be heard in return proceedings following an abduction. As there is no specification of this hearing, the actual procedure is carried out by the national courts applying national law, so that the procedures for hearing the child vary considerably between the Member States. In the Convention on Child Abduction, by contrast, there is no provision on the hearing of the child, except that there is an exception to return based on a child's objections under Article 13(2) of the Convention on Child Abduction.

Article 11(2) of Brussels II *bis* emphasises the right of children to be heard in decisions affecting them. As has been pointed out in the chapter on habitual residence[538], the more recent case law under the Convention in England mainly adopted the position that the rights and welfare interests of children are distinct from those of their parents and that a balance between those interests was required. A child-centred approach has however been a rare and the characterisation of children as being part of the interest of the whole family was the main feature of the well-known Convention case law. Only during the last decade the rights of children as individual rights have become more recognised. The EU Commission and Parliament recognised the significance of individual rights and developed a considerable number of policy documents based on the rights identified in the UN Convention on the Rights of the Child (UNCRC) and introduced by the Treaty of Lisbon as an objective to promote children's rights. In its own words, the

[537] As been discussed at p. 85, 137, 143, 146 et seq., 148, 172, 174, 178 et seq.
[538] Chapter 2 A I 1; 3 A II 1 and 3 A III.

"*framework the Commission helps to protect, promote and fulfil the rights of the child in all internal and external EU actions and policies with an impact on them."*[539]

Recital 33 of the Preamble states that Brussels II *bis* wishes to "ensure respect for the fundamental rights of the child as set out in Art 24 of the Charter of Fundamental Rights of the European Union" and Article 24 of the Charter states that children should be heard in all decisions affecting them if they are of an appropriate age and maturity, it further recognises, thereby establishing an additional link that their best interests shall be the primary consideration in all decisions concerning them.

Article 11(2) of the Regulation interacts with the return remedy. It remains unclear how the hearing set forth in 11(2) shall be reconciled with the requirement set forth in Article 11(3) of the Regulation that the judgment on the return application should be issued within six weeks.

In England and Wales, the Guidelines for Meeting Children[540] are applied. The purpose of these Guidelines is to encourage judges to enable children to get involved and connected with proceedings in which decisions are made concerning them. However, the objective of the Guidelines is not to consider the opinion of the child binding. In England, even before the Guidelines were issued, judges meeting children were regularly applying an approach evaluating a child's objection under Article 13 of the Convention on Child Abduction. As outlined by Ward LJ in *Re T*[541] it is first, for the judge to find out whether the child objects to being returned to the country of habitual residence. Second, to determine whether the child has sufficient age and maturity and third, the child's own perspective on interest in the future, "short, medium and long-term"[542] In this case, the court had also considered it necessary to consider if "reasons for

[539] available at http://ec.europa.eu/justice/fundamental-rights/rights-child/index_en.htm, last accessed 02 May 2016.
[540] The 'Guidelines for Judges Meeting Children who are Subject to Family Proceedings' [2010] 2 FLR 1872.
[541] *Re T* (Abduction: Child's Objections to Return) [2000] 2 FLR 192.
[542] ibid.

objection rooted in reality or might reasonably appear to the child to be so grounded".[543]

A significant and difficult aspect to assess is if the views of the child have been influenced by the parents.

In *Re D*[544] both the concept of hearing a child under the Convention and the Regulation were referred to. Their Lordships affirmed that the principle embedded in Article 11(2) of the Regulation that a child is given the opportunity to be heard during proceedings is very significant and

"*consistent with our international obligations under Art 12 of the United Nations Convention on the Rights of the Child."*[545]

In this case, Baroness Hale also referred to the hearing of a child under the Convention, thereby providing the possibility of the comparison:

"Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides."[546]

The very clear wording in Article 11(2) of the Regulation that

"*when applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity"*

should be understood as an initiative for the national courts to hear the child concerned not only in cases under the Regulation but also the Convention without the ambits of the Regulation. However, in a strict interpretation, this only applies to cases under the Regulation. Baroness Hales nonetheless said that

[543] ibid.
[544] *Re D (*A Child)*, supra* note 315.
[545] ibid, para 58.
[546] ibid, at para 57.

principle of universal application and consistent with the UK's obligations under Art 12 of the UN Convention on the Rights of the Child 1989 meant that children should be heard far more frequently in Hague Convention cases than had been the practice. The Baroness went on to say that in most cases an interview with a Cafcass officer would be conducted this purpose, but she also noted that in some cases it may be necessary for the judge to hear the child.[547]

Re D was a case where the boy who was the subject of the proceedings was aged 8 and had been in England for almost four years following removal from Romania and the primary question was that of custody.

In the understanding of Moore-Bick LJ in *Re KP*, the views of the child should be heard

"not only when a "defence" under Article 13 is raised but whenever the court is being asked to apply Article 12 but he adds that this should "not to be confused with giving effect to [the child's] views". [548]

There are notable differences in the European countries. Whilst in Germany, it is taken for granted that the judge speaks to the child[549]

In England, the common procedure is an interview of the child with a Cafcass officer. Though a member of this Cafcass team is always on duty for urgent Convention and other international cases, a lawyer is only involved if special situations arise out an assessment of the child's maturity and the strength and cogency of objections the child raises.[550]

The fact that it has been a rare practice to involve a lawyer or to have solicitor appointed by the child directly is quite opposite to practice in Germany and a result of a regulation[551] which provides that the court must appoint a guardian

[547] ibid.
[548] *Re D* (A Child), *supra* note 315, para 59.
[549] Heiderhoff, B., 'Kindesrückgabe bei entgegenstehendem Kindeswillen' (2014) IPRax Vol. 34, issue 6, 525-528.
[550] Available at https://www.cafcass.gov.uk/media/199238/cafcass_factsheet_private_law_april_2014.pdf, last accessed 02 May 2016.
[551] FPR 2010, rule 16.4, available at https://www.cafcass.gov.uk/media/2891/rule_16.4_march_2014.pdf., last accessed 02 May 2016.

for the child who is the subject of Convention proceedings and has been made a party.

It seems that the direct contact between the court and the child would have regard to the child's views and the interests of the child could be understood more properly.

It is suggested that the Regulation requires a revision of the approach of hearing children, with a clarification of the minimum requirements to fulfil the criteria set forth by the Regulation.

Article 11(2) of the Regulation is an important asset in protecting children's best interest in a more direct procedure than it existed before. On the other hand, by leaving it to the national law how the procedure of hearing the child is carried out, an obvious window of discretion is opened.

Whilst hearing the child has become more important, there has nonetheless been reluctance to provide the child with party status. In *Re M*[552], Baroness Hale commented that only 'settlement cases' under Art 12(2) of the Hague Convention should be cases where a child shall be made a party. Article 11(2) of the Regulation has in the English courts initiated a more considerate examination of whether and how the child involved should be heard be it by a Cafcass officer. In addition, the application of the principle under Article 11(2) of the Regulation could be extended to Convention cases if the courts follow Lady Hale's approach presented in *Re D*.[553]

Nonetheless, difficulties remain. The distinction between having children heard by a member of the Cafcass team and only rarely by a judge has a negative connotation. Whilst it is clear that the number of Hague Abduction cases has

[552] *Re M* (Abduction: Zimbabwe) [2007] UKHL 55, [2008] 1 FLR 251.
[553] *Re D (A Child) supra* note 315.

increased[554] it is hard to understand why in a German Hague case the judge would see the child and in an English case the judge would not see the child.

Another aspect is the scope of the objection of the child and the consequences thereof. As there is no requirement of the hearing in the Convention, the Regulation is just clearer and more consequent in its approach.

In *Re G*[555] the court considered an objection of a girl as to being returned to the father not an objection to being returned to Lithuania but to returning to the care of her father. The judge decided that this was not an objection under Article 13 of the Convention. The 11-year-old girl had objected strongly to being returned to her father in Lithuania; the court distinguished between an objection to returning the girl to the state of habitual residence and to returning the particular parent.

The issue of hearing children's voices hence remains controversial as the Regulation lays much more emphasis on it than the Convention, which only incorporates the objections of a mature child as an exception to returning the child.[556]

III. General assessment- enforcement of custody and access decisions under Brussels II *bis*

After the Hague Convention on Child Abduction had been dealing with the issue of enforcement for over thirty years, Brussels II introduced an additional basis for return orders in Article 11(6–8) of the Regulation. In this chapter aspects related to the interrelation of the Convention and the Regulation with regard to return orders were addressed. To assess whether the integration of enforcement in the Regulation has brought about an overall improvement, in the

[554] Press release at gov.uk, 'New FCO figures show parental child abduction cases on the rise – Almost two children a day are abducted to a foreign country by parents available at https://www.gov.uk/government/news/new-fco-figures-show-parental-child-abduction-cases-on-the-rise, last accessed 02 May 2016.
[555] *Re G* (Abduction) [2008] EWHC 2558, [2009] 1 FLR 760.
[556] Article 13 b of the Convention on Child Abduction.

interest of the children concerned, chapter has considered the case-law of the ECJ with respect to primacy of the Regulation.

A court rejecting a Hague return application on the grounds of Article 13 of the Convention on Child Abduction has to transmit a copy of the order and of the relevant documents, in particular a transcript of the hearing, to the court with jurisdiction or to the Central Authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention. The other court shall receive all these documents within one month of the date of the non-return order (Article 11(6) of the Brussels II *bis* Regulation) and must then notify the parties so that they make submissions to the court within 3 months of the date of notification. Pursuant to Article 11(8), as mentioned in the previous chapter, the court may make its decision directly enforceable in the State where the child now lives by issuing a certificate according to Articles 40 and 42 of the Regulation.

If the respective order subsequently has to be enforced in the State in which the child is present, the same court which refused to return the child under the Convention on Child Abduction often has to enforce the foreign return order. From the beginning, doubts were voiced as to whether this would work in practice. It took a few years until particular questions on the interrelating provisions on return where referred to the European Court of Justice in *Rinau, Detiček*, *Povse* and *Zarraga.*[557] The national courts in Lithuania, Slovenia, Austria and Germany provided the Court with questions and issues which - in their view - hindered an enforcement of the respective foreign return orders issued under Article 11(8) of the Regulation. In all four decisions the continuing jurisdiction of the State of the former habitual residence of a child was underlined and the Member States were requested to enforce a child return order made and certified by the courts of State of habitual residence after an unsuccessful Hague return application in the other State. The Court held that any challenges may be brought solely before the courts of the State of former

[557] *Rinau, supra* note 22; *Deticek*, *supra* note 239; *Povse supra* note 246 and *Zarraga, supra* note 444.

habitual residence. This entailed severe criticism - in the view of the strongest criticism the Regulation system of return orders should be "taken away" since they do not resolve the problem and only further antagonise the parties in abduction proceedings.[558]

C. Mutual trust or bad mood? – return and access orders

As Lord Mance wrote in 2005, private international law is the area "par excellence where no national legal system can maintain an insular attitude".[559] The consideration of the current level of mutual trust between the countries dealing with Hague and Brussels II *bis* cases is closely linked to the discussion on the critical aspects and shortcomings of the current situation under Brussels II *bis*. As already discussed, the Commission was supposed to present to the European Parliament, to the Council and to the European Economic and Social Committee, a report on the application of the Brussels II *bis* Regulation on the basis of information supplied by the Member States.[560] As yet, however, it has not presented such a report.[561] As far as the promotion of rights of access is concerned with regard to exequaturs in the Regulation the main issue remains the issue of overriding and overlapping similar provisions in the 1980 and 1996 Conventions. The inconsistencies have made it difficult for national judges to appropriately handle international child abduction cases.

While most prominently associated with child abduction cases, the difficulties evolved under the Regulation that judicial collaboration and mutual trust are particularly required in any conflict of laws case regarding a family law dispute with an international feature.

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[558] de Boer, Th.M., 'The second revision of the Brussels II Regulation: jurisdiction and appclicable law' in K. Boele-Woelki & T. Sverdrup (Eds), *European challenges in contemporary family law,* European family law series, 19, Antwerpen (2008) 321-341.
[559] Mance, 'The Future of Private International Law', (2005) Int J Priv Law, Volume 1, Number 2, October 2005, 185-195.
[560] Article 65 of the Regulation.
[561] Review announced to be published on <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33194_en.htm>, last accessed 02 May 2016.

Despite the 'guidelines' the ECJ has provided in its case law, the lack of mutual trust between Member States courts and domestic judges has become evident in *Purrucker I* and *Purrucker II.*[562] As will be discussed in the following, the impact and thereby the degree of difficulties the amended Regulation had and has experienced in the Member States depends on the legislative situation prior to the Regulation and the practice of the courts in parental responsibility and child abduction matters with a cross-border element. In the context of the analysis of the background of the Regulation, the social and judicial-cultural reasons for the national courts' different approach to habitual residence and child protection by means of provisional measures were discussed. And in the context of the analysis of the courts' and the ECJ's approach to provisional measures the Member States courts' influence to direct and lead a case became evident.

According to the Conclusions and Recommendations adopted by the Sixth Special Commission on the practical operation of the 1980 and 1996 Conventions, dated June 2011,

"(…) Convention terms such as "rights of custody" should be interpreted having regard to the autonomous nature of the Convention and in the light of its objectives" [563]

The ECJ has affirmed that the same rule applies for the Regulation.[564] As the courts in the Member States have adopted different approaches to dealing with this autonomous interpretation the significance of some international consistency becomes even more evident. The Special Commission laid emphasis on the importance of the direct judicial communications in helping to determine the law of the State of the child's habitual residence to establish if an

[562] *Purrucker I*, *supra* note 215; *Purrucker II*, *supra* note 213.
[563] Conclusions and Recommendations adopted by the Sixth Special Commission on the practical operation of the 1980 and 1996 Hague Conventions, dated June 2011, http://www.hcch.net/upload/wop/abduct2012concl_e.pdf, last accessed 02 May 2016.
[564] *Proceedings brought by A*, *supra* note 17.

applicant in return proceedings has “rights of custody” in the meaning of the Convention on Child Abduction.[565]

As has been discussed above, a particularly problematic aspect regarding the implementation of the Regulation is the refusal of the return of a child under Articles 3 and 5 of the Convention on Child Abduction instead of under Articles 12 and 13 of the Convention, thereby avoiding the application of Articles 11(6) and (7) and 11 (8) of the Regulation. This circumvention of the application of the Regulation is clearly not in the interest of legal certainty and speedy proceedings and ultimately conflicts with safeguarding the rights of the children concerned.

It can be recognised that some European judges[566] do not seem to see any necessity to communicate a return refusal unless based on Article 13 of the Convention, thereby overriding the application of Article 11(6) of the Regulation. Articles 11(7), 11(8) and 42 of the Regulation imply that the court of origin is competent to deal with the substance of the matter in its entirety and the abolition of exequatur for a decision of the court of origin entailing the return of the child pursuant to Articles 40 and 42 has been a significant problem during the last years. Articles 40–45 and Article 11(8) of the Regulation provide for a procedure to ensure that specific judgments are enforceable, based on the principle of mutual trust between Member States and the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at the European level. Nevertheless, in many cases the court obliged to enforce an order that is so certified, fails to do it and so undermines the effectiveness of the Regulation and the mutual trust between countries.

[565] Conclusions and Recommendations 2011, supra note 563.
[566] Juzgado de Primera Instancia nº 4 de San Lorenzo de El Escorial (Madrid) cited in C-256/09 – Purrucker, *supra* note 215; Purrucker II, *supra* note 214.

Where does this reluctance to enforce originate? Many countries lack particular domestic rules and internal proceedings regarding the enforcement of foreign return orders and the certificate referred to in Article 42 of the Regulation.[567]

In Italy, the juvenile courts have acquired competence to deal with cases of international child abduction[568] but continue to lack authority to enforce orders made by other Member States in matters of parental responsibility/custody. This divided competence disregards the importance of consistency and introduces a distinction between matters dealt with under the Convention and those under the Regulation, as the enforcement of judgements rendered in non-Member States which are a contracting state to the 1961 Hague Convention are still under the competence of the juvenile courts.[569] A reason for this might be the distinction made in Italian private international law between matters related to parental – child matters and matters of child protection.[570] This distinction is not, however, reflected in the case-law.[571]

In Germany, Brussels II *bis* was accompanied by the new implementation measure, the International Family Law Procedure Act (Internationales Familienverfahrensgesetz)[572]. This measure sought to depart from the rather complex structures of implementing international legislation and aimed at introducing a simple process for dealing with all aspects of international parental responsibility and child abduction matters, with the exception only of those matters arising under the 1961 Convention on Child Protection. In the ninth part of the Act, the abolition of the exequatur procedure for some decisions has been integrated, and decisions on the rights of access and certain judgments regarding the return of the child may now be enforced without any intermediate procedure.[573] Only a few local courts are determined competent for the enforcement of the respective foreign decisions (§ 12 of the Act). In such cases

[567] Boele-Woelki, K. *supra* note 21, p. 37.
[568] Salzano, A., *La sottrazione internazionale di minori*, Milan, 1995, p. 95.
[569] Boele-Woelki, K. *supra* note 21, p. 167 et seqq.
[570] ibid, p. 175 et seq.
[571] ibid, p. 178 et seq.; Tribunale per i Minorenni di Venezia in *Povse v Alpago*, *supra* note 246.
[572] Available at www.bundeszentralregister.de/hkue_esue/010.html, last accessed 02 May 2016; in the following called: the Act.
[573] In accordance with the Articles 40 et seq. of the Regulation.

it is the family law departments of these courts that are competent. Judges have to deal with a significant amendment, as the procedures on the recognition and enforcement of decisions regarding parental responsibility distinguished between the application of the Regulation and the Convention on Child Abduction and for the latter, the courts were in charge of determining the procedure of the recognition and declaration of enforceability with regard to the Convention on Child Abduction.[574] Chapter 5 of the new Act lays down in detail for the Regulation and the Convention on Child Abduction the procedures regarding the recognition and enforcement of foreign decisions. An appeal against a decision on the recognition or declaration of enforceability can be lodged with the Higher Regional Court. This procedure is very clear and may be a reason why difficulties in cases with return orders dealt with by the ECJ did not originate in decisions made by German courts. Further, the Act speeds up the return procedure in accordance with Article 11(3) of the Regulation. With regard to the Convention on Child Abduction, the Act introduced that only the Higher Regional Courts are competent to order the immediate enforcement of a decision concerning the return of the child and that those courts are obligated to examine without delay after having received the appeal whether it is necessary to take this measure in accordance with § 40 (3) of the Act. It may be argued that the cases in which the party who was ordered by a court of first instance to return a child appealed can be reduced by the new rule.[575]

In France a similar path was taken by introducing a law that provides only the *tribunal de grande instance* in family matters in the Court of Appeal with the competence to deal with cases under the Regulation and by simplifying the procedures for child abduction cases in a new section of code on civil procedures[576]. It thereby complies with the Regulation's aim of expediting recognition and avoiding abuses of the appeal procedures.[577] As *Purrucker I* [578]

[574] Staudinger/Pirrung, *supra* note 481, Article 19 EGBGB No 853.
[575] Explanation on § 40 International Family law Procedure Act, Drucksache des Deutschen Bundestags 15/3981, p. 28.
[576] Articles 1210-4 to 1210-6 of the French Code de procédure civile.
[577] Code de L'Organisation Judiciare France, Articles L312-1-1 and R312-1-1.
[578] *Purrucker I*, *supra* note 215.

was an example of how enforcement and recognition should not work and how it does not work in the interest of the child concerned, it should be considered whether this was just coincidence or whether there is in fact a relation between a long-sighted implementation of the Regulation and the functioning of a trustful procedure of the courts in enforcement and recognition procedures regarding return orders. As mentioned above, *Purrucker I* originated in Spain and a consideration of the implementation in Spain will be useful. First, there was no concept of parental responsibility similar to the one in Brussels II *bis* at all, as the concept of *patria potestad* laid down in Article 154 of the Spanish Civil Code does not include several aspects the Regulation refers to. The *Ley Organica del Poder Judicial* which applies whenever the Regulation is not applicable differs considerably to the rules of the Regulation. Spanish courts do have to deal with the question of whether the Spanish courts on territorial competence or the Regulation's rules on jurisdiction apply.

The different approaches in the implementation and the difficulties resulting from the differences in the former national law of jurisdiction, enforcement and recognition are further related to the question of competence.

In the previous chapters it was explained that family law was in a very short time transferred from not being a matter of interest of Community legislation to being one of the central issues of private international law and thereby European law. It has been discussed in detail how European private international law moved into the area of family law and who this interrelated with the national law. As has been further discussed, the rules of the Regulation deviate considerably from some national rule in force on parental responsibility before the implementation of the Regulation. Nonetheless, questions of the constitutionality of the Community's march into the area conflicts of law for family law cases were raised mainly by scholars, less by the Member States. In the Lisbon decision,[579] the German Constitutional Court considered whether the Treaty of Lisbon challenged the sovereignty of Germany. It was a peak-point decision in a series of judgments which had accompanied the various steps of

[579] BVerfGE, 30 June 2009 - 2 BvE 2/08 - Rn. (1-421).

European integration, in particular *Solange*[580], *Maastrich*[581] and the *Banana Market*[582].

Whilst the Treaty of Lisbon aimed at providing for institutional reforms it attracted a diverse range of criticism after the Constitutional Treaty of the European Union had failed. Some considered the Treaty an infringement to member state sovereignty, other argued that the new legal status of the Charter of Fundamental Rights of the European Union would pose a danger to the level of fundamental rights protection in Germany.[583] It was feared that the ECJ would be the decision-maker with regard to fundamental rights and that Article 79(3) guaranteeing central tenets of German statehood and granting would be pushed out. The Court was required to deal with a series of complaints raised against the Lisbon Treaty and accompanying domestic legislation.[584] The domestic legislation which accompanied the Lisbon Treaty was held to be unconstitutional.[585] Before the decision, it was not considered contrary to the German Basic Law if the legislature exceptionally disregarded international treaty obligations if this was the only way in which to protect the core principles of the German Basic Law. It was argued that this principle was in line with the ECJ's affirmation that the European identity had priority over a generally accepted obligation to respect the instruments of UN law[586] as affirmed in *Kadi and Al-Barakaat Foundation International v Council of the European Union.*[587] Such a national approach is closely related to the concept of *ordre public*[588] and

[580] BVerfGE (73, 339), *Solange II*, 22 October 1986.
[581] BVerfGE (89, 155), *Maastricht*, 12 October 1993.
[582] BVerfGE (102, 147), *Banana Market*, 10 June 2000.
[583] Nettesheim, M., 'Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerf G', (2009) NJW, 2867-9; Schorkopf, F., 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German LJ 1219-40.
[584] Halberstam, D. and Möllers, C., 'The German Constitutional Court says "Ja" zu Deutschland' (2009) 10 German LJ.
[585] Lisbon, 123, 267, 30 June 2009.
[586] Schorkopf, F., 'The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon' (2009) 10 German LJ 1219-40.
[587] Cases C-402/05 P Kadi and Al Barakaat International Foundation v. Council and C-415/05, Kadi v Council, [2008] ECR I-6351.
[588] Terhechte, J., 'Souveränität. Dynamik und Integration - making up the rules as we go along?' (2009) 20 Europäische Zeitschrift für Wirtschaftsrecht 724-31 at 726; Nettesheim, M., *supra* note 583.

the option of a withdrawal from the EU as provided by Article 50 of the Treaty on the European Union.

Hesselink argues that there will regularly be situations where the application of the rules will lead to unfair and unreasonable results and that, in such cases, a judge (to whom he refers as a modern judge) or a Lord Chancellor who will be prepared to mitigate the most unfair outcomes.[589] As has been discussed in various contexts, the EU does not have the general competence in the field of private law that it may be assumed to have in other fields. Rather, the competence had to be derived from 114 TFEU. Collins[590], van Greven[591] and Smits[592] are just a few commentators who support the view that a European private law should be developed bottom-up and that the area is not covered by European competence. Micklitz argues that the European Commission "was aware of the fact that a competence debate could have produced counterproductive effects". However, the CESL was a step in the other direction and one supported by the Commission.[593]

In the understanding of Caruso and Niglia, conflict and resistance are regarded as a possible reaction of the Member States, objections of the national parliaments of Member States may demonstrate the limits of European regulatory private law and that the EU has no competence to with regard to issues that are part of the national private legal orders, competence being only one of the reasons.[594] Subsidiarity and proportionality are the other ones. Whilst nation-state private law matters may have to be "reconstructed in a Market State European perspective"[595], the legal order of family law is a totally different one and a reference to the principle of a free market of non-discrimination is not suitable. As the Commission has the legislative initiative and the Parliament has

[589] Micklitz in Niglia, L. (Ed.), *Pluralism and European Private Law*, Oxford 2013, p. 246.
[590] ibid, p. 45.
[591] ibid, p. 45.
[592] ibid, p. 45.
[593] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Common European Sales Law to Facilitate cross-border transactions in the single market, COM/2011/0636 final, p.4.
[594] *supra* note 502.
[595] *supra* note 589, p.48.

limited and shared legislative competence, there is a constant issue of limited possibilities to hinder legislation. In the following chapters the fact that the Hague Conventions on Child Abduction and the Hague Convention on Child Protection contain rules on applicable law whilst the Regulation leaves out this important set of rules, will be examined. It will be examined what influence this "gap" in legislation has had in the interrelationship of the rules and in the dealing of the national courts with the respective legislation and, as a consequence what influence this "gap" has for the preservation of the interests of the respective child/children.

D. Regulation and Convention cases in the ECtHR – conflict or positive control?

I. Introduction

Being one of the four exceptions to the requirement to return to the home jurisdiction any child who has been wrongfully removed in breach of rights of custody, Article 13(b) of the Convention on Child Abduction (the grave risk exception) also plays a significant role in the development of the ECtHR's increasing influence on the interpretation of Convention and Regulation cases, as will be outlined in the following section. In the UK Supreme Court case of *Re E* [596], the main argument of the appeal was that the respondent to a return order application is always entitled to a review in the determination of the defence as laid down in Article 13(b) of the Convention on Child Abduction.

To refuse an order to return a child to their country of former habitual residence, the court must be convinced that a return order would expose the child to a grave risk of physical or psychological harm or that it would place the child in an otherwise intolerable situation. In *Maumousseau*, the mother had wrongfully retained her daughter who had French and US nationality in France. The US Central Authority, in 2003, transmitted to the French Central Authority a request

[596] *Re E*, *supra* note 405.

for return. In May 2014 the Aix-en-Provence Court of Appeal issued a return order and in the meantime the New York court had awarded sole custody to the father. The mother appealed against this judgment to the Court of Cassation claiming a violation of Article 13 (b) of the Hague Convention and of Article 8 of the ECHR, however the return order was upheld by the Cour de Cassation.[597] Since there were difficulties in enforcing the return order, the child was ordered care.[598]

II. The application to the European Court of Human Rights alleged a violation of Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). Though the application was not accepted, the court's judgement contained an assessment of the interaction between the European Convention, the UN Convention on the Rights of the Child 1989 (UNCRC) and the Convention on Child Abduction as well as a clear reference to 'the concept of the child's best interests' introduced by the UNCRC, underlining that it is the "primary consideration in the context of the procedures provided for in the Convention".[599] However, the Chamber refused to accept the submission that the Convention on Child Abduction did not promote the child's best interests in the present case.[600] In the following sub-chapters the treatment of Regulation and Convention cases by the European Court of Human Rights and the general competence of the ECHR to protect the best interest of the respective child/children will be critically examined.The Neulinger and Raban decisions

Since *Neulinger*[601], the aspect of time has become an important element in cases of return orders. For Hague return orders and their (non-)enforcement,

[597] *Maumousseau and Washington v France*, Application No 39388/05, 06 December 2007.
[598] ibid.
[599] *Maumousseau and Washington v France*, supra note 597.
[600] ibid.
[601] *Neulinger and Shuruk v Switzerland*, *supra* note 105.

the ECtHR has looked at the time which passed between the day the order was made and its enforcement, also considering at what time the abduction occurred. Under Article 11(8) of the Regulation, one would probably also have to look at the time elapsed since the abduction itself. It can be a critical question whether the enforcement of an order meets the standards of human rights. But the question is also whether the standards set by the UNCRC and the European Convention on Human Rights stand above the rules of the Regulation or independently beside the Regulation. It also has to be considered that the Charter of Fundamental Rights of the European Union adopted in 2000, the scope of which is even wider than that of the ECHR, became part of EU law under Article 1(8) of the Treaty of Lisbon.[602]

Neulinger concerned Convention on Child Abduction proceedings in Switzerland brought by the father and seeking the return of his son to Israel. The mother and her son applied to the European Court of Human Rights alleging that the return order made by the Federal Tribunal breached their right to family life under Article 8 of the ECHR and was a violation of Article 6 of the ECHR, arguing that the Swiss court had adopted an improperly restrictive interpretation of the exceptions to a return order under the Convention on Child Abduction.

Whilst the Court found the complaint under Article 8 of the ECHR was admissible, it rejected the claim of a violation. However, the applicant mother was granted a referral to the Grand Chamber and an interim stay on enforcement of the return order was granted pursuant to this, so that the Grand Chamber finally decided that the period of time of 5 years which had passed since the child had been removed from Israel, could not necessarily be considered constituted a breach of the applicants' rights under Article 8 of the ECHR.[603] The judicial proceedings in Switzerland began on 8 June 2006 and the case was decided before the Grand Chamber on 6 July 2010. Judge

[602] With respect to the European Convention on Human Rights the situation is different than with respect to the Charter. On 18 December 2014, the Court of Justice issued a negative opinion on the European Union's accession to the ECHR, Opinion 2/13 [2014].
[603] ibid.

Malinverni stated that, once the conditions for the application of the Convention on Child Abduction have been met, the status quo ante should be restored "as soon as possible in order to avoid the legal consolidation of de facto situations that were brought about wrongfully" but that after such a long time the restoration of the status quo ante [was] simply no longer possible to envisage and that due to the passage of time, and the facts discovered with respect to the child's father, the child's return to Israel would not be in the child's interest.[604]

The Judges accepted that the Convention on Child Abduction was applicable and that the applicant had acted "wrongfully" in bringing the child to Switzerland without the necessary authorisation from an Israeli court. Hence, the child would have had to be returned to Israel in accordance with Article 12 of the Convention on Child Abduction unless the conditions for not doing so in Article 13 of the Convention had been fulfilled. Judge Lorenzen emphasised that it is not the European Court of Human Right's "*task to take the place of the competent authorities in examining whether, […], there would be a grave risk that the child would be exposed to psychological harm within the meaning of [Article 13].*"

National courts, as Judge Lorenzen emphasised, have a margin of appreciation to undertake this assessment.

It was undisputed, in the Swiss courts and by the Court, that a return of the child to Israel without the mother would have exposed the child to a grave risk of psychological harm.

The Federal Court in Switzerland stated that it could reasonably be expected that the child would return to Israel accompanied by the mother and the Chamber asserted this assumption. Judge Lorenzen addressed this particular question in his opinion and concluded that only the child concerned by the Convention on Child Abduction could be assumed to be under an obligation to

[604] *Neulinger*, *supra* note 601.

return and that no assumption could be made with respect to the holders of parental responsibility.[605]

For a decision on the return, the Convention on Child Abduction does not refer to any connection between the acting wrongfully of the holder of parental responsibility holder's acting "wrongfully" and the return of a child together with a holder of parental responsibility to join the other holder of parental responsibility or to live close to the holder of parental responsibility.

The European Court of Human Rights suggested that the refusal of the return of the second applicant in this particular case would have undermined the normal application of the Convention on Child Abduction but it is not the competence of the European Court of European Rights to supervise the application of the Convention on Child Abduction, independent of whether or not the assessment of Article 13 was sufficient.

Silberman criticises that the European Court of Human Rights expanded the 'grave risk' defence under Article 13(b) to cases when the child was 'well-settled' in its new environment following a wrongful removal[606] and contests that such an interpretation is inconsistent with the Convention regime. Silberman further underlines that Article 12 of the Convention on Child Abduction only provides a defence to return on the basis that the child is settled in its new environment if the Hague return proceedings are commenced no later than one year after the wrongful removal or retention.[607] The ECJ, in contrast to the ECHR, seems to favour the enforcement of return orders made by the courts of the State of former habitual residence to a more absolute extent.[608] It thus

[605] Judge Lorenzen in *Neulinger*, *supra* note 601.
[606] Silberman, L., 'The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, Neulinger, Zarraga' (2011) Oklahoma Law Review, Vol. 63, 733.
[607] ibid.
[608] *supra* note 246; as noted, the Regulation has adopted a fundamentally different approach to the question on the return of the child than the Convention on Child Abduction, most importantly the ability of the courts of origin to order the return pursuant to Article 11 (8) of the Regulation. The primacy of the courts of the former habitual residence of the child requires cooperation between the courts of the requested State and the courts of the state of habitual residence, as set forth in Articles 11 (6) and 11 (7) of the Regulation.

remains to be seen how the two courts will manage to establish a co-existent cooperation which is indispensable for the courts applying the Convention on Child Abduction and the Regulation.

Silberman also extends her criticism to *Raban v Romania*[609] which concerned a challenge to Article 13(b) of the Convention on Child Abduction defences. An Israeli-Dutch father and a Romanian mother had two children in Israel. Whilst the father agreed that the mother would take the children to Romania for a period of six months, the mother informed the father after a month that they would not be returning. At first instance the Romanian Court at which the father had started proceedings ordered summary return. However, the order for return was overturned on appeal based on the argument that there was a parental agreement that the children would be in Romania until an improvement in the father's financial situation and that the children would be at grave risk of harm if returned. Based on this decision, the father issued proceedings on behalf of himself and the two children, alleging breaches of Article 8.

The European Court of Human Rights decided this case by reference to the decisions in *Maumousseau* and *Neulinger*. In particular, it underlined that Article 3(1) of the UNCRC requires that in all actions concerning children their best interests shall be the primary concern. The ECtHR suggested that it had the function of a reviewing court and that significant issue to decide was whether a fair balance between the interests of the child, the parents and public order could be reached and whether this balance falls within the margin of appreciation of the Contracting States. Whilst the ECtHR further emphasised that the domestic authorities are required to carry out an in-depth examination of the entire family situation within the context of the Hague Convention proceedings, it seems unrealistic to expect that such examination is being carried out in each case. The Convention on Child Abduction in all the years it has been in place has been interpreted very different with respect to Article 13 and the mechanism in Article 13, setting forth an authorisation to the courts of the requested State to refuse to order the return of the child was criticised as

[609] *Raban v Romania*, *supra* note 106.

flawed.[610] Considering that the Convention on Child Abduction has had no authority as the ECJ constitutes for the Regulation, to provide for guidance to the national courts as to how the welfare situation of the child should be assessed, it is understandable that different interpretations have developed and that view on what assessment a court needs to undertake differs from contracting state to contracting state. The Regulation does not give way to such discretion as far as return orders are concerned[611] and the ECtHR does in addition not have the competence to assess whether the correct application of the Regulation constitutes a violation of a provision of the European Convention on Human Rights.[612]

In the above mentioned *Raban v Romania*, the ECtHR ruled that the decision of an appellate court in Romania not to order the return of children unilaterally removed from Israel by the mother though the father had "joint custody" did not violate the father and children's right to family life. It laid emphasis on the margin of appreciation of the national court which held that the father had given his consent to the relocation and that the children were well-integrated and well taken care of by their mother.[613] The approach of the Court at first appears different than in *Neulinger*. The Court recognised that the assessment of an abducted child's best interests was the task of the domestic authorities, for which they had a margin of appreciation, under the Convention on Child Abduction. However, the Court then contests that it had to ascertain whether the domestic courts had conducted an in-depth examination of the entire family situation[614], and had made a well-balanced assessment of the respective interests with a focus on the child in the context of an application for return to the country of origin.

Whilst it is of course of central importance that "the concept of the child's best interests should be paramount in the procedures put in place by the Hague

[610] *Re M, supra* note 331.
[611] Chapter 4 hereof.
[612] Because of a lack of ratification of the ECHR.
[613] *Raban v Romania*, *supra* note 106.
[614] ibid.

Convention."[615] It is not understandable why the Court sought to assess the reasoning of the Romanian court and the interpretation adopted in respect of Articles 3 and 13(b) of the Convention on Child Abduction.

III. Re E and the further steps of the ECtHR

In *Re E*[616], a case finally dealt with by the Supreme Court in England, the mother and the father had met in Spain in 2001 and then moved together to Norway where their two daughters were born in 2004 and 2007. The mother had lived in Norway until September 2010 when she moved with the daughters to England without the father's consent. It was not disputed that this constituted a wrongful removal within the meaning of the Convention on Child Abduction.

Pauffley J found that the protective measures offered by the father to the children and the support available to the mother were sufficient and that the requirements of an Article 13(b) defence were not met. A subsequent appeal to the Court of Appeal was dismissed and the children's return ordered.[617] The order was stayed pending the outcome of a further appeal to the Supreme Court. The appeal was dismissed and the court noted that the primary objectives of the Convention on Child Abduction are to avoid that either parent takes the law into his/her own hands, and to ensure that the child is returned to his/her home country if an abduction occurred. The Supreme Court underlined that the Convention was designed for the benefit of children, not for the benefit of adults, allowing parents only a limited number of rebuttals. It further emphasised that "to say the least, [it is] unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents. The violation in Neulinger arose, not from the proper application of the Hague Convention, but from the effects of subsequent delay"[618] which seems to be a bad example in this context, as was explained in detail. However, the Supreme Court further outlines that Article

[615] ibid.
[616] *Re E*, *supra* note 405.
[617] ibid.
[618] *Re E, supra* note 405, para 26.

13(b) was drafted to consider the future of the child, arguing that such future depended on the protective measures which would be ordered to prevent the child from facing an intolerable situation. Article 13(b) had not previously been considered before either the Supreme Court or the House of Lords. The Supreme Court's reference to *Neulinger* was restricted to the conclusion that the cases in the Court of Appeal required no changes. *Re E* is a demonstration of how *Neulinger* influenced judges in abduction cases to consider *Neulinger.* In *Re E* the judge even considered an appeal necessary to provide the Supreme Court with an opportunity to take a closer look at the recent decisions of the European Court of Human Rights. The uncertainties caused by *Neulinger* are difficult to evaluate without considering many individual cases in the regional courts of national jurisdictions, but it is clear from the wording of the judgement in *Re E* that it did cause confusion and disapproval in the national courts. In Germany, only two higher regional court cases hitherto referred to *Neulinger*, both argued that *Neulinger* did not change their evaluation of the situation and interpretation of Article 13 in the context of the case.[619]

It is clear from the most critical paragraph in *Neulinger* that the ECtHR allowed itself an assessment which interpretation of the Convention and which evaluation of the family situation is required. This hierarchical aspiration of the ECtHR that it is competent to provide a strict guidance with respect to the interpretation of the best interest (best solution in the interest) of the child is discordant with the aims of the Hague Conference and the European legislation to find a harmonised approach with regard to child abduction.[620]

"In addition, the court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and

[619] OLG Hamm (Higher Regional Court), Decision of 27 November 2012 – II-11 UF 250/12, regarding Article 13 I b), Article 13 para 2; OLG Stuttgart (Higher Regional Court), Decision of 22 June 2011 - 17 UF 150/11.

[620] Study: 'Cross-border parental child abduction in the European Union', Directorate-General for Internal Policies - Policy Department C: Citizen's Rights and Constitutional Affairs, p. 411; Bogan, M., *Some reflections on the treatment by the ECHR of the Hague Convention on the Civil Aspects of International Child Abduction*, Periodical 2013; Forner i Delaygua, J., González Beilfuss, C., Viñas Farré, R. 'Entre Bruselas y La Haya. Estudios sobre la unificación internacional y regional del Derecho internacional privado. Liber Amicorum Alegría Borrás', Spain 2013, p. 213; Walker, L. / Beaumont, P.*, supra* note 445.

allowed those concerned to present their case fully … To that end the court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."[621]

In *Re T*, a first instance case with some interesting considerations on the Convention on Child Protection and the ECHR, Jackson J made clear that in his view *Neulinger* did not require

"the court to transform its approach to Hague Convention proceedings whether in terms of principle or procedure. The true effect of that decision did not require the court to carry out an in-depth examination of the entire family situation in each and every case as to do so would defeat the very purpose of the Convention".[622]

Further, he argued, he would

"not read Neulinger as a warrant for falling over in the other direction and approaching the Hague Convention exceptions broadly, liberally (or however else it might be described), or substantially differently from present established practice."[623]

The ECtHR suffered a relapse by referring to the principles adopted in *Neulinger*[624] in *Lipkowsky and McCormack v Germany*[625] but then found the complaints inadmissible. It has been mentioned before that the President of the Strasbourg court acknowledged extra-judicially that the decisive paragraph was to be interpreted in the context of the specific case, thereby attempting to defuse the concern generated by, in particular, paragraph 139 of *Neulinger*.

[621] *Maumousseau and Washington v France, supra* note 599, para 74.
[622] *Re T* [2010] EWHC 3177 (Fam), para 15.
[623] ibid, para 11.
[624] *Neulinger*, *supra* note 601.
[625] *McCormack v Germany*, Applikation No 26755/10, 18 January 2011.

Other than *Re T*, *Re E*[626] was before the Court of Appeal. The Court of Appeal judges, as I mentioned above, referred the case to the Supreme Court despite expressly mentioning that it is not for the Strasbourg court to decide what the Hague Convention requires. The Appeal Court judges had a very plausible explanation what the scope of the ECtHR's review of Convention cases could be and what could not be within this scope. It considered an investigation into the family situation and other relevant circumstances necessary for deciding whether the risk was sufficiently serious to fall within Article 13(b). Hence, in the court's view, the investigation under Article 13(b) would be less specific than the investigation undertaken by a court deciding substantive issues and *"Any proper conclusion about the child's best interest in the medium and long term was inevitably precluded"*.[627] This statement of the court clearly suggests that the Convention provides sufficient ground for a consideration of all exceptional circumstances which might impair a return or non-return of a child in its best interest and that separate consideration of the ECHR would interfere with the principles of clarity and legal certainty. A full investigation of custody and other issues should be made by the court in the country of habitual residence since it is best suited to undertake a full investigation and the court evaluating the grave risk of harm in the context of an Article 13(b) defence has to consider the immediate, not the ultimate, best interests of the child.[628] In the case of *Re S* the UK Supreme Court considered it not right that the European Court of Human Rights had reiterated the suggested requirement of an in-depth examination and considered such requirement "entirely inappropriate".[629]

IV. Shaw and Sneersone

In *Shaw*[630], a final Hague return order had been made by the Hungarian courts in September 2008 and the order was not enforced during the next ten months.

[626] *Re E*, *supra* note 405.
[627] *Re E*, *supra* note 405.
[628] ibid (paras 5, 42, 48, 50-59, 68, 70).
[629] *Re S, supra* note 403.
[630] ibid.

Until the European Court of Human Rights gave its judgment in July 2011, the mother and the child had not been found and the Court held that by not enforcing the return order the Hungarian authorities had violated the father's right to respect for family life. However, it held that "the passage of time may change the circumstances" and that this may "call for an eventual re-assessment of [the respective child's] ties to the parents and their environments respectively".[631] This is a repetition of what the Court had decided in *Neulinger.*[632] No less contradictory is the conclusion that non-enforcement may violate the left-behind parent's rights under Article 8 of the Convention whilst delayed enforcement may violate the rights of the child and the other parent as protected under Article 8 of the Convention on Child Abduction. As was explained, this is contradiction in the case law related to parental responsibility and is particularly problematic in in view of the fact that the delay in *Neulinger* was caused by the Court itself.

In *Sneersone*[633], the ECtHR had to consider the procedure introduced by Article 11(8) and Article 42 of the Regulation for enforcing return orders made by the State of former habitual residence subsequent to an unsuccessful Hague return application in the State to which the child was taken. In *Sneersone*, the Italian court issued a custody order in favour of the father, who remained in the country of prior habitual residence and ordered the return of the child to Italy. The court issued a certificate pursuant to Article 42 of the Regulation, as such making the order immediately enforceable in Latvia. The application to the ECHR was brought against the enforceable Italian order by the mother and the child (the resident in Latvia). The Court found a violation of Article 8 of the ECHR and concluded that the Italian court had given insufficient consideration to the reasons which had earlier convinced the Latvian court to refuse to return the child to Italy.

The Court accepted the applicants' complaint that the father's home had not been inspected by the Italian authorities so as to assess whether it provided a

[631] *J and A Buday v Belgium*, Application No 4320/11, 10 July 2012.
[632] *Neulinger*, *supra* note 601.
[633] *Sneersone and Kampanella v Italy*, *supra* note 530.

suitable home for a young child, a consideration absolutely unrelated to return proceedings. In *J and A Buday v Belgium*[634] the Court confirmed this approach and issued a provisional measure staying the return of the child until the Belgian Court of Cassation had decided upon a further appeal.

E. Conclusion

Neulinger has diverted the views on what the scope of evaluation with regard to the best interest should be and has caused considerable ado.[635] In the higher courts of Germany and England, it was made clear that the Convention sets its own guidelines for its interpretation, with discretion for the established national case law, and that a reference to or violation of the ECHR is not standing to reason if the Convention on Child Abduction is correctly applied. In *Re E*, the judges in the Appeal and Supreme Court made clear that any evaluation of grave risk of harm in the context of an Article 13(b) defence had to consider the immediate, not the ultimate[636] best interests of the child, so as to secure the interests of the child in the specific situation. One difficulty which arises with respect to Article 13(b) the confidence that the structure contained in the Convention will automatically provide the degree of protection required to the children concerned. Whilst a parent's legal representatives might raise this issue and the Convention is based upon principles of comity and mutual trust[637] different contracting states' legal systems pay different levels of regard to

[634] *J and A Buday v Belgium*, *supra* note 631.
[635] Walker, L., 'The impact of the Hague Abduction Convention on the rights of the family in the case-law of the European Court of Human Rights and the UN Human Rights Committee: the danger of Neulinger' (2010) J Priv Int L, 6(3), 649-682; Silberman, L., *supra* note 73; Paton, J., 'The correct approach to the examination of the best interests of the child in abduction convention proceedings following the decision of the Supreme Court in Re E (Children) (Abduction: Custody Appeal)', JPIL 2012, 8(3), 547-576.
[636] *Re E, supra* note 405.
[637] But contrary to the Regulation, the Convention text or the Explanatory Report, *supra* note 104, do not mention those.

instruments such as ‘undertakings' and the court might be hindered from seising jurisdiction of its own motion upon a child's return.[638]

The Hague Conference in its Conclusions and Recommendations to the 6th Special Commission[639] noted ‘the serious concerns’ which had been expressed with regard to *Neulinger* and *Raban*. The President of the ECHR in an address to the Franco-British-Irish Colloque on Family Law tried to wave away concerns that the decisions were a change of direction by the court in the area of child abduction.[640] Though the ECtHR has made a recognisable contribution to the application of the Convention on Child Abduction when it laid emphasis on the need for a faster enforcement of return orders[641] in the interest of the child, the recent decisions, in particular *Neulinger*, demonstrated that the Court misunderstands its role with regard to the Convention. In *Neulinger* the Court went beyond its competence by attempting to interpret the rules of the Convention on Child Abduction, rather than deciding whether there had been violations of human rights and thereby interfered with and brought an imbalance to the delicate system of jurisdiction on child abduction cases, which would “jeopardis[e] the aims and objectives of the Hague Convention”.[642] Besides those substantive aspects and the issue of competence, the length of proceedings in the ECtHR and the stay of orders for the proceedings cannot be disregarded. The ECtHR was set up to hear complaints of alleged violations of human rights and fundamental freedoms under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and is

[638] Conclusions and Recommendations of the fifth meeting of the special commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9. November 2006) adopted by the Special Commission, available at https://assets.hcch.net/upload/concl28sc5_e.pdf.

[639] Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011) Conclusions and Recommendations adopted by the Special Commission available at https://assets.hcch.net/upload/concl28sc6_e.pdf, last accessed 02 May 2016 see para 48.

[640] Costa, J., ‘The Best Interests of the Child – Recent Case-Law from the European Court of Human Rights’ (2011) IFL, 183.

[641] *Maumousseau*, *supra* note 599.

[642] Black LJ in *Eliassen and Baldock v Eliassen and others*, [2011] EWCA Civ 361, para 123.

presently competent to hear complaints with respect to the ECHR, it is not a tribunal supposed to interpret the Convention on Child Abduction. It is beyond debate that the Convention on Child Abduction clearly allocates the interpretation of its provisions to the national court competent to deal with the case.[643] As this thesis compares the functioning of the Convention's and the Regulation's provisions in the interest of the child concerned, it may be noted that this allocation of competence with respect to the interpretation of the Convention's provisions can be considered a weakness of the Convention. Particularly, as was discussed in detail, Article 11(8) of the Regulation provides, in any case, for priority of the decisions of the Member State where the child was habitually resident before the removal, a priority even over a non-return order of a requested State.

In any case, Article 8 of the ECHR should not impede the children's best interests by encouraging an abducting parent to delay the return hoping that the decision of the ECtHR would lead to stays and, as has been shown, extensive delays.

By referring to the obligation of the national authorities to conduct an in-depth examination of the entire family situation in the context of Article 13(b), the ECtHR ignores Judge Costa's remarks on *Neulinger*. Whilst there is something positive about the Court's emphasis on the significance of the respective child's interests, the decision on the return of a child should not be delayed by the proceedings before the ECtHR. As the Supreme Court stated in *Re E*, the Convention on Child Abduction does not allow for a consideration of the best interests of the adult whose rights may have been infringed by the abduction of the child.[644] It will be evident from the above that there are disadvantages and advantages of the ECHR making statements on the application of the Convention on Child Abduction. It is however a tightrope walk of the ECtHR to act beyond its competence and to attempt to take influence on the complex

[643] Walker, L. / Beaumont, P., *supra* note 445.
[644] *Re E, supra* note 405, at para 15.

system of the Convention on Child Abduction which already requires a complex process in the national courts.

The ECtHR on the contrary, in its decisions in *Neulinger*, *Raban* and *X v Latvia*[645]*, has* given rise to serious concerns as it attempted to interpret the Convention on Child Abduction rather than restricting its decision to the question whether there have been violations of human rights. It is doubtful that the European Court of Human Rights' judgments in *Neulinger* and *X v Latvia* are compatible with the policy aims of the Hague Convention to discourage international child abduction and ensure the summary return of abducted children. It seems clear that the higher national courts have not accepted the approach in this respect.

Leaving aside the issue of competence discussed above, the European Court of Human Rights has regularly examined whether the Convention on Child Abduction was applied correctly.

According to the Court, the non-return of a child may constitute an interference with Article 8 of the ECHR as a right of the parent and/or the child and therefore has to be in accordance with the law and pursue a legitimate aim. Pursuant to the Court the interference has to be "necessary in a democratic society".[646] It is decisive whether the national authorities have done everything that could reasonably be expected of to find a balance between the different interests. If this was not the case, this omission was considered a violation of the right to respect for family life guaranteed by and laid down in Article 8(1) of the ECHR.

In cases of non-enforcement of Hague return orders, the assessment carried out by the ECtHR whether the authorities had done everything that could reasonably be expected, at first sight seemed to strengthen the system of the Convention on Child Abduction in its efforts to returning abducted children.[647]

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[645] *Neulinger and Shuruk v Switzerland*, *supra* note 105; *Raban v Romania*, *supra* note 106; *X v Latvia*, Application No 27853/09, 26 November 2013.
[646] *S & Marper v The United Kingdom*, Applicationsnos. 30562/04 and 30566/04, 4 December 2008.
[647] Janzen, U., Gärnter, V., 'Rückführungsverweigerung bei vorläufiger Zustimmung und internationale Zuständigkeit im Falle von Kindesentführungen' (2011) IPRax, Vol. 31, No 4, 412.

This was the situation until *Neulinger,*[648]as discussed above. Despite President Costa's speech regarding *Neulinger*, the ECHR issued two more decisions.[649]

In *Sneersone*[650] the ECtHR even found a human rights violation in the order as such.

Both Courts have to remain within the framework of their respective mandate. Whilst the ECJ does of course not decide the individual case, it gives binding guidelines to the national courts on the interpretation of the Regulation. Besides this significant task, it must not disregard the best interests of the child in question in the concrete case in favour of the respective legislation as whole. In all cases decided so far, the ECJ emphasised that it was its aim to always have jurisdiction safely placed in the state of former habitual residence of the child. Delays in enforcement are a noticeable problem for the courts, both when applying the Convention on Child Abduction and the Regulation. However, this problem cannot be inhibited by the ECtHR.

Considering that the European Union's accession to the European Convention on Human Rights as required under Article 6 of the Lisbon Treaty has yet to be completed, how the ECtHR will address these issues after accession remains an issue for speculation. Whilst the Lisbon Treaty, with its achievement of a legally binding Charter of Fundamental Rights and a commitment by the European Union to accede to the European Convention on Human Rights, paved the way for a system of fundamental rights protection within EU legislation, the European Union's accession to the European Convention on Human Rights (ECHR) has not been realised and an expert opinion of December 2014 has revealed the severe difficulties of an interrelation of the principles under the ECHR and the principles of the EC Treaty[651]. This is a complex issue of competence and it is not surprising that the accession negotiations took over three years to find a balance between safeguarding "the

[648] ibid.
[649] *Sneersone and Kampanella v Italy, supra* note 530.
[650] ibid.
[651] Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=400431, last accessed 02 May 2016.

specific characteristics of the Union and Union law"[652] and preserving the features of the ECHR system, such as the authority of the ECtHR and the subsidiary nature of the protection mechanism. The negotiating parties have yet to find a solution for those issues of competence. The current system of the protection of fundamental rights is a complex framework of the national law, including in most countries the national constitution's fundamental rights, the ECHR and its protocols, the EU legislation, all of which do not just co-exist but interact and interrelate. Clarity for the national judges dealing with child abduction and parental responsibility cases about the applicable standards is urgently required and the priority of the Regulation's application or the Convention on Child Abduction's application respectively over any other interests should be clarified. Both human rights and the preservation of the interests of children require a very careful evaluation. A determination of levels of protection based on generally worded provisions of fundamental rights legislation in terms of applying whatever provision that offers the "highest" level of protection seems doomed to remain essentially indeterminate. "[…] it is very difficult to think of liberty as a commodity."[653] Whilst the ECJ recognises "the special significance" of the ECHR as interpreted by the ECtHR,[654] the Regulation contains specific rules that require an autonomous interpretation. Such an autonomous interpretation does not require the autonomy and primacy of the EU's legal order the ECJ laid emphasis on in *Kadi*

"[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement."[655]

[652] See Article 1 of Protocol No. 8 to the Treaty on the Functioning of the European Union.
[653] Dworkin, R., *Taking Rights Seriously*, Havard (1977), p.270.
[654] Case C-305/05, *Ordre des barreaux francophones et germanophone and Others*, [2007] ECR5, paragraph 29; Case C-274/99, *Connolly v Commission*, [2001] ECR I-1611; Kadi, supra note 587.
[655] ibid, *Kadi and Al Barakaat International Foundation v Council*, para. 316.

But an autonomous, independent interpretation is essential. It preserves legal certainty for the parties concerned and for the national courts.

An accession of the European Union to the ECHR should not lead to a situation in which orders or decisions under the Regulation are made subject to review before the ECtHR if the result is to infringe the best interest of children. Rather, the national courts must be obliged to safeguard fundamental rights when considering the Regulation and the ECHR, giving primacy always to the interests of the children concerned rather than the interests of the holders of custody.

Chapter 5 Applicable law, structural amendments and perspectives of a harmonised system

A. Introduction

As the analysis of the preceding chapters has shown, in international cross-border parental responsibility and abduction cases, the best interest of children does not only require a consideration of the competent court, fair procedures with regard to return, non-return decisions, and swift recognition and enforcement but also a a consideration of safety and welfare issues. Both the state of habitual residence and the state to which the child was removed or retained, have a duty to ensure that the relevant provisions of the Regulation and/or Convention(s) are applied in the interest of the children concerned Finding the competentcourt, enforcing an order or recognising a judgment pursuant to Brussels II *bis* and, as applicable, in accordance with the complementary structure of the Convention on Child Abduction are only one issue of the proceedings. Another question to be considered is whether a set of rules on applicable law would bring about a chance for a balanced interaction between the instruments. In any parental responsibility and child abduction case[656] the law applicable to the proceedings will have to be determined and ideally, in the interest of swift and fair proceedings, the court should be familiar with the law it applies.

Legislation in the area of private international law has been at the heart of the reinforced European integration brought by the Treaty of Amsterdam and provisions in the area of family law were at the forefront of harmonisation ambitions when Vivienne Reding was Commissioner and the focus was on the creation and development of a so called 'European Area of Civil Justice'.[657]

[656] Leaving aside divorce because of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[657] Treaty establishing the European Community (Amsterdam consolidated version) OJ C 340, 10.11.1997, p. 173-306, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997D/TXT&from=EN.

With the refugee crisis the focus of the Commission moved and the approaches for further harmonisation of the private international law rules and substantive law become rare.[658] Harmonisation of a certain area of law has during the last decades always strongly depended on the initiatives by the Commission.[659] Private International Law is the area "par excellence where no national legal system can maintain an insular attitude"[660] and where further harmonisation will certainly be approached again by the Commission. However, the current version of the Regulation 'solely' covers jurisdiction, recognition and enforcement and no provisions on applicable law.

B. Applicable law – the Regulation's drawback to the Conventions

As was explained in the context of the interrelation, Chapter V of the Regulation concerns the general relationship between the Regulation and the Conventions.

In principle, according to Articles 59(1) and 62(1), the Regulation supersedes all multilateral and bilateral conventions between Member States, however relating to matters to which the Regulation applies and the Regulation does not contain any provisions on applicable law.

Article 60 of the Regulation sets forth that "in relations between the Member States" the Regulation takes precedence over Conventions so far as matters covered by the Regulation are concerned. On the one hand there are the cases of intra-community situations which were referred to the in previous chapters, on the other hand, as was also mentioned, the Regulation also gives rise to situations in which one or even two third states are involved. Article 36 of the Convention on Child Abduction establishes that

[658] Relevant in the context of this thesis is the European Commission's Press Release "Towards a true European area of Justice: Strengthening trust, mobility and growth", in which the Commission identifies mutual trust as one of three key challenges after the forthcoming end of the European Council's Stockholm Programme on 1 December 2014. http://europa.eu/rapid/press-release_IP-14-233_en.htm, last accessed on 02 May 2016.
[659] Once the refugee crisis became an issue of concern the focus was on the legislative framework to regulate the situation.
[660] Lord Mance, *supra* note 559, at p. 185.

"nothing in this Convention shall prevent two or more Member States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction."

A seemingly straightforward approach would be to include a set of provisions or a central provision on applicable law in the Regulation. Hodson argues that including applicable law in the Regulation would add to the current problems in European family law, as it would increase costs, add to uncertainty and would make settlements slower.[661] In his view, applying the national law of the place of jurisdiction would be the most reasonable approach. In furtherance to the interrelation and interaction of the Convention on Child Abduction and the Regulation in Chapter 3, with regard to the Convention on Child Abduction, further interaction is created by the operation of the Convention's applicable law rules within the European Union. Article 62 of the Regulation states that the Convention shall continue to have effect with regard to matters not governed by the Regulation. As the determination of the applicable law is not dealt with by the Regulation, a reference is made to Article 14 which reads:

*"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State **may** take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."* [emphasis added] hier

The important word here is "may" as highlighted in italics. „May" does not mean that the courts are obliged but rather that they can apply the national rules on private international law. Hence, the first impression is that, for the parties concerned, the legal certainty under the clear structure of the rules on jurisdiction, recognition and enforcement, despite the pitfalls created by the

[661] Hodson, D., 'Forum Shopping, First to Issue, Applicable Law and a Future Global Family Law Solution' presented at the International Family Law Workshop, Waterford Institute of Technology, March 30th 2012.

interaction, seems to go up in smoke. And with respect to cases of parental responsibility and custody under the Regulation, the applicable law provisions of the Convention on Child Protection will apply to those Member States who are parties to it, but only when it applies in the Member States.

Besides the questions of applicability of the Convention on Child Protection and the Regulation the relationship between the Convention on Child Protection and the Regulation also has to be considered in the context of the applicable law. Among Member States the Regulation prevails for the jurisdictional issues in most cases. The same is true for the recognition and enforcement of decisions from other Member States of the Regulation.[662] On the other hand, the non-jurisdictional rules of the Convention on Child Protection apply in all procedures, even when the jurisdiction is based on the Regulation.[663] As the scope of application of the Regulation is very similar to that of the Convention, the application of the rules on applicable law in the Convention will be possible in most cases regarding parental responsibility and custody issues.[664] Whilst the Regulation hence prevails in matters of jurisdiction, recognition and enforcement, the Convention on Child Protection applies in relations between Member States in matters of applicable law, since this subject is not covered by the Regulation.[665]

The provisions of Articles 16-18 of the Convention on Child Protection require parental responsibility to be determined in accordance with the law of the state of the child's habitual residence. As has been discussed with regard to jurisdiction it may not always be avoided that more than one state has jurisdiction in relation to cases involving parental responsibility and related children matters and authorities and courts in different states may consider that they have jurisdiction. In the Regulation, the issue of competing jurisdictions between Member States is dealt with by giving predominance to the Member State first seised as it is set forth in particular Article 19(2) as well as Articles 17

[662] as discussed in Chapter 4 hereof.
[663] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 8.1.
[664] Practice Guide for the application of the Regulation (2014), *supra* note 129, section 8.3.
[665] ibid, section 8.3.1, Article 61.

and 19(3) of the Regulation. Article 15 provides a Member State having jurisdiction the power to request another Member State to assume jurisdiction, or to stay the proceedings however the other Member State must consent to the transfer.

Article 21(1) of the Convention on Child Protection excludes the application of *renvoi*, by specifying that the reference to the term 'law' of another State means 'the law in force in a State other than its choice of law rules'. Hence, 'law' refers to the law of that contracting state and not to its private international law. Pursuant to Lowe, the effect of this is to

"*disapply, except as provided for by Arts 15(2) and 21(2), the law of the State of the child's domicile or nationality insofar as the child is neither domiciled in, nor a national of, a State whose law is to be applied by Arts 15–18."*[666]

One exception is provided by Art 21(2) of the Convention on Child Protection which applies if the law applicable pursuant to Article 16 is the law of a non-Contracting State. Article 21(2) states:

"*if the law applicable according Article 16 is that of a non-Contracting State and if the choice of law rules of that State designate the law of another non-Contracting State which would apply its own law, the law of the latter State applies. If the other non-Contracting State would not apply its own law the applicable law is that designated by Article 16."*

Hence, as the Regulation does not contain any provisions on applicable law as to the substance matter in parental responsibility cases, the Convention is applied.[667] However, for the courts, with the difficulties of the application of the Regulation in particular in matters of recognition of enforcement analysed in the previous Chapter 4 herein[668], it becomes evident that the application of the Convention on Child Protection in addition to the Regulation poses the courts

[666] Lowe, N., *supra* note 477, section 4.24.
[667] Wagner, R., Janzen, U., 'Die Anwendung des Haager Kinderschutzübereinkommens in Deutschland' (2011) FÜR, 110, 112 et seq.
[668] as discussed in Chapter 4 B. hereof.

with an additional burden. Also, the link between jurisdiction and applicable law which is firmly established in private international law is disrupted.

Back to Hodson's suggestion referred to at the start of this chapter. Hodson suggests that extending the Regulation to applicable law or establishing a new instrument on applicable law is not the answer to such difficulties as it would also lead to even more uncertainty and make settlements slower.[669] Hence, in his view, the enhancement should include the appointment of specialist family court judges in each Member State to deal with complex international cases and that once a place of jurisdiction has been determined, those judges should then apply the national law.[670] In terms of harmonization an integral framework of one Regulation dealing with jurisdiction, recognition, enforcement, provisions on return orders and a central provision on applicable law would be more convincing than any diverted framework with complementary rules. But ratifications of the Convention on Child Protection have just taken place and it will remain to be seen how matters develop in the national courts when both the Convention on Child Abduction and the Convention on Child Protection are regularly applied as an additional layer to the Regulation.

C. Structural Amendments to the Regulation

As was discussed in the previous section, integrating a provision on applicable law would be a structural change which could however be implemented into a recast of the Regulation without much. In the previous chapters, several specific suggestions for possible amendments to particular provisions and the mechanism on interrelation were made and approaches to avoid the current problems were discussed. In Chapter 3, the concrete problems of the interrelation were approached and in Chapter 4 the severe difficulties related to return proceedings with the application of Article 13 of the Convention on Child Abduction, Article 11 and Article 15 of the Regulation were discussed. The guidance provided to the national courts by the European Courts of Justice with

[669] Hodson, D., *supra* note 661.
[670] ibid.

respect to the application of the Regulation may be considered in the context of structural amendments aiming at a harmonisation of procedural rules. On the other hand the complications imposed by the involvement of the ECtHR were addressed, should, it has been concluded, should not lead to any amendments of the RegulationHence before moving on to a final conclusion on the research question it is significant to consider, in furtherance to those specific issues related to provisions on a stand-alone basis and to the provisions of interrelation, that there are some structural issues which the analysis in the preceding chapters has revealed.

De Boer's harsh criticism, including that he can "hardly believe that the drafters were aware of the negative consequences of *perpetuatio fori* in matters of parental responsibility."[671] can be confuted. The analysis has not given any indications that the problems in application of the Regulation result from the application of the concept.

Lowe published the results an analysis of an empirical study on the application of the return mechanism under the Convention on Child Abduction conducted back in 2001.[672] Since then, the complimentary nature of the Regulation and the Convention have completely changed the nature of return proceedings within the EU. In 2007, when Brussels II *bis* had just been implemented, Lowe mainly refers to the lack of clarity,[673] a problem which has to a considerable extent been resolved by the case law discussed herein. But the complexity of proceedings in more than one Member State remains. In addition to return proceedings under the Convention on Child Abduction (and, in interrelation, the Regulation), in cases involving provisional measures, there are usually at least two other proceedings pending in both the state of the former habitual residence and the state of refuge. The court of former habitual residence has jurisdiction

[671] De Boer, Th., 'What we should not expect from a recast of the Brussels II bis Regulation', Netherlands Internationaal Privaatrecht 33(1), 10-19, 14.
[672] Lowe, N., A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CHILD ABDUCTION, Doc. prél. No 3 Prel. Doc. No 3, March 2001.
[673] Lowe, N., The current experiences and difficulties of applying Brussels II revised. Presented at: 3rd Anglophone/Francophone Family Law Conference, Edinburgh, UK, June 2007.

to rule on the substance of the rights of parental responsibility and order any provisional measures, and these orders are to be recognised and enforced in the state of refuge.[674] Considering all the difficulties of interpretation when the Convention is applied, such system of parallel proceedings in more than one state is truly problematic. The court in the state to which the child has been removed or retained will have at least jurisdiction to take urgent provisional measures. Hence, in practice, as the case law analysed in this context of provisional measures has shown, if the parents have cases in two or three courts and in different proceedings the Regulation's structure on child abduction proceedings has not improved the procedural efficiency and fierce fights on return orders are not prevented.

As the recent case-law analysed in this thesis has shown the court in the state of habitual residence has primacy, it may issue a decision entailing the return of the child and such decision overrides a decision made in the state to which the child was taken, and there is no possibility to oppose the recognition or enforcement of this decision. This has significantly amended the Hague procedure with regard to the question of which state may further proceed on the merits of the case. But this amendment, in the context of return orders, which are a, if not the vital part of abduction cases, an advancement has not occurred.

The judgments in *Detiček*, *Povse* and *Zarraga*[675] have provided helpful guidance to the interpretation and application of the Regulation's provisions, however those decisions have also revealed the inherent difficulties of distrust among the Member States with regard to the return proceedings under the Regulation's regime.

Based on the findings of their empirical study, Beaumont, Walker and Holliday in their recent analysis conclude that "*given the very limited effectiveness of*

[674] ***Detiček v Sgueglia, supra*** note 239

[675] ***Detiček***, *supra* note 244; *Povse supra* note 246 and *Zarraga v Pelz, supra* note 444.

Article 11(6)-(8) Brussels IIa and the time and costs involved for the parties and the judges it should be scrapped."[676] and that

"*EU Member States should be able to have the mutual trust in each other's courts that if a Hague return has been refused in an intra-EU case then the Hague Convention has been applied correctly, the habitual residence of the child has shifted to the State of refuge and the courts there are in the best place to determine issues of parental responsibility and access.*"[677]

Based on the analysis in the preceding chapters, of the provisions, their application in the courts and the guidance provided by the ECJ and their actual potential in view of the research question, such positive evaluation of the Convention and negative evaluation of Article 11 (6)-(8) is not supported. An evaluation based on the successes during a limited period of time is a limited indication of the potential of a provision. A return to the original concept of the Convention on Child Abduction and its return proceedings would be a move backwards, from a harmonised European set of rules to an international, but more isolated approach, as the advantages of the provisions securing the interests of the child concerned by such situation, *id est* the prompt return, the hearing of the child, the last word to the court in the Member State of the habitual residence of the child and the concrete consideration of the child's best interests, would be erased. It has to be considered that not only paragraphs (6)-(8) would be "scrapped" but that Article 11 would be erased from the Regulation, with those disadvantages.

However, as has been established, the underlying national procedural rules should be adapted to the Regulation. The Central Authorities under the Regulation should be obligated to provide assistance both to the parent from whom the child has been abducted and to the abducting parent as, ultimately, any decision on child abduction should consider what is in the best interest of

[676] Beaumont, P., Walker, L., Holliday, J., 'Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU', http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_1.pdf, last accessed 01 May 2016.
[677] Ibid.

the child, penalisation of the abductor is not necessarily in the best interest. Compared with the Convention on Child Abduction, the reference in the Regulation's provisions is a very valuable step forward in this regard, as it at least requires the courts to consider the best interests of the child, thereby supporting a more child-centred approach. Whilst the case law has shown that the courts in England take a consideration of the best interests very seriously and explicitly refer to it, the ECJ case-law has revealed the procedural difficulties in respect to actual enforcement. And in other jurisdictions (the continental jurisdictions), there is almost no possibility to control if the judgements take the best interests approach as serious as it is suggested in the Regulation.[678]

The Convention on Child Abduction has the ultimate weakness of undefined concepts and terms, allowing for considerable discretion of the courts. At times, the terms and concepts have been interpreted in a way respecting the interests of the parents rather than the interests of the children concerned (habitual residence and grave risk) and hence, a return to the Convention's scheme on return and non-return would be a retrogate step. To this extent, the provisions of the Regulation provide legal certainty and clarity which is in the best interest of the children concerned. The Convention can be interpreted in a way respecting the best interests of the child but only the Regulation has brought the awareness that this is a must rather than an option.

"[T]he dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object which is to secure the prompt return of children who have been wrongfully removed or retained."[679]

National courts in Convention cases have used their discretion with respect to the interpretation of the central concepts of habitual residence, grave risk, hearing the child and in applying the concept of return orders. Whilst this

[678] Beaumont, P., Walker, L., Holliday, J., *supra* note 676, p.3; the authors found it considerably cumbersome to select data from most continental Member States.
[679] Perez-Vera, E., Explanatory Report, *supra* note 285, at paras 20 – 23.

discretion has been contained by the interrelation with the Regulation, the interaction itself has proven difficult. Hence, as a possible approach, the scope of interaction may be reduced to a minimum in an amendment of the Regulation and the Regulation may be extended to cover the complete concept of return and non-return.

As an alternative, in order to overcome the difficulties arising from the interrelation on return orders in particular and the provisions on child abduction in general, it is suggested that Article 13 of the Convention has to be interpreted with more respect to the interests of the children concerned. An over-interpretation of 'exceptional' as a qualifier to return should be avoided and the approach presented in *Re M*[680] should be followed.

Whilst pursuant to the Explanatory Report

"*these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area*"[681],

the national courts have not had guidance on how this aim might be reached.

As Lady Hale noted on Article 13b of the Convention on Child Abduction

"[…] the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant […] and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so."[682]

Even if the defence of 'grave risk' is established, a concept which has been interpreted in various way in the English and US courts, there is the difficulty that the structure being put in place will provide the required degree of

[680] *Re M & Anor*, *supra* note 331.
[681] Perez-Vera, E., Explanatory Report, *supra* note 285, at para 25 and 29.
[682] *Re D* (A Child) *supra* note 315.

protection as different contracting states' legal systems have different applications and instruments such as ‘undertakings' and the court might have no ability to seise jurisdiction of its own motion upon a child's return.

Courts are relying upon those protective measures being implemented by the requesting state and must assume that the undertakings being enforced but the Convention lacks a mechanism for enforcement so that the protective measure in fact takes place.

If the complementary nature of the Regulation and the Convention is maintained, as for further possible amendments, either an exception is needed to Article 61 of the Regulation, or, non-Member State abductions should be regarded as falling outwith the material scope of the Regulation and therefore not bound by the provision.

Necessity and possibility for amendment would consist for both the Convention on Child Abduction and the Regulation but it is questionable whether any of Brussels II *bis* jurisdiction rules will be revised in the near future since the Proposal for a Regulation amending this Regulation[683] has not been progressed. But some changes to Chapter III, Sections 2 and 3 of the Regulation amending the procedural framework would be required to clarify the obligatory nature.

The Public Consultation on the functioning of the Brussels IIa Regulation (EC 2201/2003) had revealed some concerns of Member States, judges and lawyers with respect to the practical functioning of the Regulation, but mostly the criticism was light in the reports. In the UK response[684] it was stated that the UK considers that it would not be appropriate for the EU to require minimum procedural standards for the hearing of the child and that the procedure relating to the enforcement of a return order under Article 42, “where the return order is

[683] Proposal for a Regulation amending the Regulation, *supra* note 269.
[684] UK RESPONSE to the EU PUBLIC CONSULTATION ON THE OPERATION OF COUNCIL REGULATION (EC) No 2201/2003 and to the REPORT FROM THE COMMISSION ON THE APPLICATION OF COUNCIL REGULATION (EC) No 2201/2003, file:///C:/Users/GIG/Downloads/UK%20GOVERNMENT%20RESPONSE%20BRUSSELS%20IIa%20CONSULTATION.pdf, last accessed 01 May 2016.

made in the Member State of the child's habitual residence and which overrides the non-return order in the Member State where the abducted child is, should be a matter for the national law of the Member State where the child is."[685] Contrary to what is suggested in the analysis herein the UK considered it inappropriate to introduce common minimum enforcement standards in a revised Regulation.[686] In general, the UK's report stated no major concerns and answered most questions by saying that the system was satisfactory.

At the time, most Member States did not submit a report but solely answered the questions.[687] For analysing the results of the answers in this Public Consultation, in particular the results of Member States, judges and Central Authority staff will be considered, Furthermore, the results of judges and Central Authority staff members will be considered since a majority of those, according to their answer of the specific question, had practical experience with the Regulation at the time of the survey. The results of this same group of participants will further be considered specifically for the UK, Germany and Austria, and France. In addition to this, it will be considered if the answers provided by lawyers, judges and Central Authority staff members deviate from the answers of the other two groups of participant referred to.

The question whether they thought that "the Regulation is a helpful tool in cross-border cases concerning custody over a child" was answered with "yes" by all participants. The question whether "the Regulation is a helpful tool in cross-border cases concerning access rights to children" 52.82% of the judges, Member States and Central Authority staff members answered "yes". With respect to parental responsibility rights the result was similar.[688]

With respect to the efficiency of the scheme in the Regulation on child abduction, 48.62% of the participating judges, Member States and Central Authority staff members and 50.90% answered "no" whilst to the general

[685] Ibid, p. 5.
[686] Ibid, p. 5.
[687] See the Submission to the Consultation at https://ec.europa.eu/eusurvey/publication/BXLIIA#, last accessed 02 May 2016.
[688] Ibid.

question as to whether the interrelation between the Convention on Child Abduction and the Regulation was functioning well, 51.62% answered “yes” and 47.78% answered “no”. In all the answers relating to the functioning of the current rules, the views of this group of participants deviants significantly from Member State to Member State. Considering the answers of judges only, the percentage results were very similar to those of the group of Member States, judges and Central Authority staff members. In the UK, 68% percent of the judges and Central Authority staff members answered “yes” to the questions regarding the functioning of the interrelation with the Conventions. Views were divided on whether there should be improvement to the actual enforcement procedure (50%/50%) but with respect to the necessity of improvement of the return order procedure 68.75% answered ”yes”. 62.50% of the judges and Central Authroty staff members answered that the cooperation mechanism ensuring a transfer should be improved.

In Germany and Austria which have similar legal systems, those judges and Central Authority Staff Members requesting improvement of the return order procedure had no majority and the request for an improvement of cooperation was weaker than in the UK and in general among the Member States. But in contrast to the UK, where this group did not consider an amendment to the hearing procedure necessary, in Germany and Austria among this group it was considered that “common minimum standards for the *hearing* of a child could help in avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country”. Among the participants from this group in all Member States, this question was answered “yes” by 53.05% and on the questions of necessity for the enforcement procedure with regard to return orders, 52.01% answered “yes” whilst on the questions of enforcement in parental responsibility cases views were divided (49.56 % each “no” and “yes”).

Among lawyers, judges and Central Authority staff members in France, there was a strong majority seeking to improve the actual enforcement of return orders and no majority seeking to improve the enforcement with respect to parental responsibility. Both as to demanding minimum requirements for the hearing procedure and an enhanced cross-border cooperation there was a strong majority.

Among lawyers, judges and Central Authority staff members in all Member States, 53.31% considered minimum standards for hearing would improve "avoiding the refusal of recognition, enforceability and/or enforcement of a judgment from another EU country" and on enforcement of return orders regarding parental responsibility 51.34% requested improvement and on enforcement of return orders in child abduction cases, 50.41% considered an improvement would be helpful. Among this group, among all Member States, 53.43% requested better cooperation as to the transfer procedure.

The answers to the above mentioned questions by the participants who are academics in all Member States demonstrate that their perception of the mechanisms is slightly more pessimistic though a majority of 54.85% have not had practical experience with the Regulation at the time the Public Consultation was undertaken.

It is suggested that the Public Consultation revealed that a majority of those practically experienced with respect to the application of the Regulation would support certain improvements. However, views deviate among the Member States as to in which part of the provisions improvement would be most relevant. With respect to concrete measures of cooperation and the rules on enforcement of return orders in child abduction cases, the survey has revealed that an improvement is sought by a majority but that there is satisfaction with the integration in the Regulation in general.

For a comparison with the elimination of the procedures on child abduction from the Regulation as suggested by Beaumont, Walker and Holliday[689], it needs to be considered that the results of the study undertaken by Beaumont, Holliday and Walker which were then referred in the analysis of 2015[690] were based on a case study of available cases, a questionnaire sent to the Central authorities

[689] *supra* note 676.
[690] Beaumont, P., Walker, L. and Holliday, J., 'Not heard and not returned: the reality of Article 11(8) proceedings'. (2015) FL (2). 124-133.

and the responses of researchers in the Member States,[691] The authors mainly criticise that the courts of the habitual residence pursuant to Article 11(6)-(8) may insist on the return of a child who has been abducted if a court in the state to which the child was abducted has refused to return the child on the basis of one of the exceptions provided for in Article 13 of the Convention on Child Abduction. The data collected for this study was collected on cases which were Article 11(6)-(8) Brussels II *bis* proceedings arising from Article 13 Hague non-return orders made between 1 March 2005 and 28 February 2014.[692] It is acknowledged in the analysis by the authors that "it was difficult to trace Article 11(8) cases" and that the questionnaire to Central Authorities was not answered regularly and as envisaged and, it is additionally acknowledged by the authors that the collection of data in the Member States was not pursued in the same way in every Member States. Hence, the submissions by the academic researchers were a significant contribution to the Study:[693] and In comparison, in the survey of the EC Commission, 304 judges and 269 members of staff of the Central Authorities from all Member States and, additionally, 288 lawyers participated in providing answers to the questions mentioned above, as part of the official questionnaire.

D. Conclusion

It is suggested that the concise analysis of the rules, as it has been undertaken in Chapters 2, 3 and 4, and the procedural reality and the case law have revealed deficiencies in respect to the return and non-return procedures, but that the dark picture which Beaumont, Walker and Holliday draw of the

[691] Beaumont, P., Walker, L. and Holliday, J., 'Conflicts of EU Courts on Child Abduction: The reality of Article 11(6)-(8) Brussels IIa proceedings across the EU', (2016) 12 Journal of Private International Law 211, 258.
[692] Ibid.
[693] Ibid, according to the authors, the questionnaire was distributed to all Central Authorities in May 2014 requesting data in relation to Article 11(6)-(8) Brussels IIa proceedings following on from a non-return order under Article 13 of the Hague Child Abduction Convention in the period between the entry into force of Brussels IIa and 28 February 2014. Most Authorities provided some information but no information was provided by the Authorities of Greece, Slovenia, Spain, Sweden and England and Wales. Judges were requested as members of the European Hague Network. Interviews with judges and practitioners were undertaken in the Netherlands, Belgium, Latvia, Portugal and the UK.

provisions on child abduction in the existing Regulation does not seem reflective of the current situation. This, as has just been demonstrated, is supported by the outcome of the Public Consultation. In terms of harmonization an integral framework in one Regulation, a recast of Brussels II *bis* dealing with jurisdiction, recognition, enforcement, provisions on return orders and a central provision on applicable law would seem valuable. Having seen in this sub-chapter how the central difficulties inherent in the Regulation's rules which were discussed in detail in the preceding chapters could be overcome by conceptual changes, it is suggested at this stage that certain improvements to the provisions would be advantageous. The final chapter will now conclude on the findings made throughout the thesis so as to answer the cornerstone question, whether, in consideration of the analysis of the current structure, an advancement has been brought about by the Regulation in terms of legal clarity and certainty, to promote the best interests of the child(ren) concerned,

Chapter 6 Conclusion

"[T]he dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object which is to secure the prompt return of children who have been wrongfully removed or retained."[694]

A. Provisions on jurisdiction and habitual residence

The analysis has shown that the central concepts under the Convention on Child Abduction have been prone to different interpretations in the different jurisdictions. In particular the concept of habitual residence under the Convention on Child Abduction has been interpreted with different approaches and in a very flexible way by the national courts in England and in the United States. In the first two chapters it has become clear that this, as such, has triggered uncertainty for the Parties concerned, in particular, the children involved in the disputes. For the Regulation and hence for intra-community situations the ECJ has, in the short time[695] Brussels II *bis* exists, established a new, autonomous interpretation of the definition of habitual residence and dispensed with the interpretations of the case law of the contracting states to the Convention on Child Abduction.[696]

Whilst the European Court of Justice has set forth that habitual residence is ""the place which reflects some degree of integration by the child in a social and

[694] Perez-Vera, E., Explanatory Report *supra* note 285, at paras 20 – 23.
[695] Compared to the Convention on Child Abduction.
[696] Cases in the UK *Re Bates*, *supra* note 20; *Re F*, *supra* note 144; *Re R*, *supra* note 144; *Cameron v Cameron*, *supra* note 144; *Re P-J*, *supra* note 153; *in the Matter of KL*, *supra* note 152; *A v A and another, supra* note 154; *M v M, supra* note 282 and in the US: *Application of Robinson , supra* note 20; *Friedrich v Friedrich*, *supra* note 21; *David S v Zamira S, supra* note 21; *Re N, supra* note 21; ECJ cases on habitual residence: *Proceedings brought by A, supra* note 17; *Rinau, supra* note 20; *Mercredi v Chaffe, supra* note 130; *Sundelind Lopez, supra* note 34; ECHR case: *Neulinger and Shuruk v Switzerland, supra* note 105.

family environment"[697] it also held that habitual residence depends on numerous factors[698] and has supported the necessity of a full consideration of the circumstances in all decisions.[699]

In contrast to the Regulation, the Hague Conference in the Convention on Child Abduction avoided a comprehensive definition of 'habitual residence', supporting that it is a "well-established concept" and a "question of pure fact".[700]

There is a priority of the state of the former habitual residence, however, whilst this concept builds on the return of the child to the state of the former habitual residence, the authorities of the contracting state in which the child is present is responsible for initiating the return of the child.

Based on the established case-law under the Convention, or rather the discretion allowed for under the Convention, there has at first been reluctance to adopt the definition of habitual residence provided by the European Court of Justice, and in *Re H-K*[701], the Court of Appeal expressed its unwillingness to interpret habitual residence in accordance with the language of the European Court of Justice in *Mercredi v Chaffe.*[702] It argued that "the European meaning of habitual residence will, by osmosis, shape the autonomous meaning to be given to that phrase in the International Hague Convention on Child Abduction with the stress on its international application".[703]

An autonomous interpretation of the Regulation is not just what the ECJ requests. It is also legitimate in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties which sets forth the basic rules of treaty interpretation, in Article 31(1): "A treaty shall be interpreted in good faith

[697] *Proceedings brought by A, supra* note 17, para 44.
[698] *Proceedings brought by A, supra* note 17.
[699] *Proceedings brought by A, supra* note 17; *Rinau, supra* note 20; *Mercredi v Chaffe, supra* note 130; *Sundelind Lopez, supra* note 34; ECHR case: *Neulinger and Shuruk v Switzerland, supra* note 105.
[700] Perez-Vera, E., Explanatory Report, supra note 285.
[701] *Re H-K* supra note 319.
[702] *Mercredi v Chaffe, supra* note 130.
[703] *Shah* (*Reg v Barnet LBC), supra* note 317.

in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."

More recently, as discussed in detail in the thesis, in *A v A*, the Supreme Court reflected on the debate as to whether the concept of habitual residence in the case law of the courts of England and Wales for the purposes of the Convention on Child Abduction differed from the interpretation of the Court of Justice with respect to the Regulation.[704]

The Supreme Court held that the concept of the Court of Justice should be favoured, thereby clearly supporting the child-centred interpretation of the ECJ.

"[T]he test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors."[705]

It is anyhow not at the discretion of the national courts to decide whether or not they want to accept the interpretations provided for by the ECJ with respect to the concepts under the Regulation. But it is a true improvement that national courts accept those interpretations and guidance and thereby promote a harmonised interpretation of the Regulation.

In the set of jurisdictional rules under the Regulation, there is one valuable, exception to the strict structure of allocating jurisdiction to the courts of the habitual residence. A court which would otherwise have jurisdiction in accordance with Article 8 may request the courts of another Member State to assume jurisdiction if the courts in that Member State are "better placed to hear the case". [706]

This reference to a court "better placed" in Article 15 is indeed a valuable approach. It establishes a sui generis *forum non conveniens* jurisdiction for national courts only in relation to children in situations where it is deemed that

[704] *A v A and another, supra* note 154.
[705] ibid.
[706] Article 15(1) of Brussels II *bis.*

the transfer of a case to another court would be in the child's best interests. The qualifier that it must be in the best interests and the wording allowing for a transfer only to a State with which the child has a particular connection, considerably restricts the discretion of the national courts and only pave a way to a transfer of jurisdiction where such transfer would be reasonable. Whilst only two cases have been decided on the interpretation of Article 15 of the Regulation[707] it is suggested that this rule is a perfect example of how the Regulation can truly promote the consideration of the 'best interests' by the national courts.

B. Provisional measures

With respect to provisional measures, the Regulation provides a clear structure. But, as the analysis has shown, Art. 20 raised many questions. Most criticism can be confuted. *Detiček* has made evident that provisional measures adopted in accordance with Article 20 of the Regulation may not operate as means of by-passing the jurisdiction rules which apply in the event of the wrongful removal or retention. Moreover, the best interests of the child may make it necessary for a court to not order his or her return to the Member State of origin.[708] However, contrary to the procedural structure under the Convention on Child Abduction it is not for the court of the Member State of enforcement but for the court of the Member State of origin to decide in this respect. In *Purrucker II*[709], in 2010, the ECJ held that Article 20 of the Regulation may not be regarded as a provision which determines substantive jurisdiction and that due to the objective of the Regulation it is "in the best interests of the child, [that] the court which is nearest the child and which, accordingly, is best informed of the child's situation and state of development, takes the necessary decisions."[710]

[707] *Re M, supra* note 196; *AB v JLB, supra* note 198.
[708] *Detiček*, *supra* note 239
[709] *Purrucker II, supra* note 213.
[710] *Purrucker II, supra* note 213, para 84.

Besides those valuable clarifications provided with respect to provisional measures[711] the ECJ's repeated reference to the best interests of the child not only demonstrates the emphasis it lays on respecting Recitals 12, 16 and 21 of the preamble but also the actual expectation that the national courts *will* consider the best interests.[712]

In an environment of complicated ping-pong proceedings, attempts at transfer, appeals and provisional measures in each jurisdiction,[713] the ECJ's rulings on provisional measures have been very adaptive to the fast movements of parents and their children within the European Union's borders and beyond.

A stand-alone change of circumstances resulting from a "gradual process such as the child's integration into her new environment" is not a sufficient ground for the court of the Member State in which the child is present to adopt provisional measures under Article 20 of the Regulation.[714]

An interpretation favouring the parent responsible for the wrongful removal would neither be in accordance with the wording of Article 20 of the Regulation nor in accordance with the Regulation's objective to deter wrongful removal and retention. Under the Regulation it is for the court having jurisdiction as to the substance of the matter to consider the circumstances and strike a balance.

As a second important concept in the interest of the children concerned the Regulation establishes a connection between parental responsibility and divorce proceedings under the Regulation, thereby recognising the tie between those proceedings.

C. The innovative provision - Article 12

The very valuable prorogation rule of Article 12 allows the court seised in divorce proceedings under the Regulation to additionally have jurisdiction in

[711] *Purrucker II*, *supra* note 213.
[712] *Purrucker I*, supra note 215, reference is made in paras 15, 36 and 91.
[713] *M.A. v Austria* supra note 254.
[714] *Detiček*, *supra* note 239, para 47.

matters of parental responsibility connected with the divorce if is in the best – in this prevision referred to as the "superior"- interests of the child. [715]

A positive feature of Article 12 allows for the divorce court to hear the parental responsibility case only if the link between the parental responsibility case and the divorce court is sufficiently strong. However, several courts may be seised simultaneously of a dispute over parental responsibility since the jurisdictional grounds pursuant to Article 12 are not exclusive grounds and hence the court in the Member State of the habitual residence maintains jurisdiction.

D. Interrelation and the issues of enforcement

Making evident the interrelation of the Regulation and the Convention on Child Abduction, the ECJ outlined in *Rinau*[716] that the rules on the enforceability "tie[s] in very closely with the provisions of the 1980 Hague Convention".[717] The obligation to order return under the Convention is levered out whenever it can be shown that the child is "settled" in the "new environment" and as there is no reference in the Convention as to when this situation is to be assumed, the national courts have discretionary power as to the assumption of such a situation.

As the analysis has shown, owing to the complementary character of Articles 11(6)-(8) of the Regulation, those provisions turned out to be much stronger than the wording of the provisions suggests,[718] whilst the first part of Article 11 turns out to be weaker than the wording suggests. the Practice Guide's assumption that the "rules of the Regulation (Article 11(2) to (5)) prevail over the relevant rules of the Convention"[719] is theory rather than practice. Both the first part and the second part delineate the interrelation with respect to the return mechanism but (1)-(5) have proven to lack the practical strength of (6)-(8) and

[715] Article 12 Prorogation of jurisdiction, discussed in Chapter 2.
[716] *Rinau*, *supra* note 19.
[717] ibid.
[718] as discussed in Chapter 4 hereof.
[719] Practice Guide for the application of the Regulation (2005), *supra* note 30, section 4.3.6.

the hearing procedures have not be applied as the legislator envisaged.[720] The additional layer of rules has led to a complete change to the system of child abduction proceedings under the Convention on Child Abduction and this change has led to problems of enforcements. There is however no indication that the procedures are less efficient than under the Convention only when the interests of children concerned were often considered less significant than those of the parents in the context of 'grave risk', as can be derived from the analysis in Chapters 3 and 4.

"B2R has added a dramatic further dimension to proceedings under the Convention in which the application is for the child's return to a fellow EU state. When, on whatever basis, it refuses an application under the Convention for return to a non-EU state, a court in England and Wales will conventionally embark […] on a merits-based inquiry into the arrangements which will best serve the welfare of the child; and it will reasonably anticipate, particularly in the light of the presence of the child here, that its decision will be fully enforceable. But when, by reference to article 13 of the Convention, it refuses an application for a child's return to an EU state, it is aware that an order for return, immune from challenge, may nevertheless be forthcoming from that state; and that therefore the order for non-return may well provide no more than a breathing-space."[721]

As the analysis showed, this paragraph in *In the matter of LC* overstates the strength of Article 11(6)-(8) but describes the strict procedural setting of the provisions securing that the exceptions to a return order under the Convention are reinforced by the set of exceptions described in Article 11 of the Regulation.

With a reference to *Rinau*, the ECJ in *Zarraga* held that the Member State of enforcement cannot oppose recognition and enforcement of a certified judgment issued on the grounds of Article 11(8), thereby making clear that recognition is automatic.[722]

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[720] Recital 19 of the Regulation.
[721] *In the matter of LC, supra* note 439, para 21.
[722] *Zarraga v Pelz*, supra note 444.

To draw a final conclusion on this significant decision it is helpful to concisely recall the circumstances.

The Spanish court had awarded sole custody to the father, requesting the child's return to Spain and following this, a series of appeals were initiated. Upon the mother's appeal that the child should have been heard by the Spanish court, the Spanish court certified the custody decision in accordance with Article 42 of the Brussels II *bis* Regulation, which lead the mother to request from the German court the non-recognition of the judgement. This was granted. The father appealed.

As paragraph 11 of the Article 42 certificate requires the court of origin to expressly confirm that the child has been given the opportunity to be heard, not hearing the child is a procedural breach. But under the Regulation, in the view of the ECJ in *Zarraga*, the court of the Member State of enforcement has no power to review a certified judgement made in accordance with Article 42(2).[723]

The question is if the rights of the child concerned are thereby deprived of judicial protection since the Spanish court retained the sole power of review.

As the analysis on the lack of mutual trust has strikingly demonstrated the ECJ's referral to mutual trust between states is problematic. It is one of the cornerstones of the Regulation that the courts of one Member State trust in the willingness of the courts of another Member State to regard the obligation to protect fundamental rights. The Spanish court considered it had not breached the child's right to be heard, as the child had been provided with the opportunity to be heard and only the mother had refused the child this opportunity. The pitfall here is, as was discussed in detail, that the duty of the courts to hear the child is a duty under national procedural rules. As was discussed, Germany's procedural rules provide for a high standard with regard to the child to be heard, and it is common practice for the child to be heard by the judge.

Though hearing the child is an integral part of the right to a fair trial and by not hearing the child, Spain may have breached this right, a review by the ECtHR

[723] Ibid.

would have likely only delayed the proceedings further and hence not been in the interests of the children concerned.

So it is concluded that the ECJ is right to argue that challenges against the return order, its enforceability as such or against the certificate issued pursuant to Article 42 of the Regulation must and may only be before the courts of the State of former habitual residence.[724]

But the recognition of judgments adopted in accordance with the provisions of Chapter III, Section 1 (Recognition) of the Regulation allow the Member State of enforcement to undertake public policy considerations and an obligation to act in the best interests of the child concerned to oppose recognition. The distinction between the provisions in Section 1 and Section 4 of the Regulation, makes evident the inherent problem. Section 4 should be amended to overcome this problem.

The ECJ's reference to the principle of mutual trust, a system where all national courts provide an equivalent and effective level of judicial protection[725] makes evident that, for the Regulation's system to work properly, the courts are forced to trust in the procedural settings under the national law of another Member State. In its Report in 2014, the Commission identified the differences in the national procedures with respect to enforcement and identified them as an issue of concern but made no suggestions how such difficulties could be erased.[726]

But despite clear rulings from the Court of Justice that the orders should be enforced and the children returned, in both cases discussed in detail (*Zarraga*[727] and *Povse*[728]) the children were not returned to the state of origin. Considering the difficulties discussed herein with respect to Articles 11(6)-(8) the suitability

[724] *Zarraga v Pelz*, *supra* note 444.
[725] ibid, para 59 and 61.
[726] COM(2014) 225 final, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, p.13 et seqq.
[727] *Zarraga v Pelz, supra* note 444.
[728] *Povse v Alpago, supra* note 244.

of the process under Article 42 should be reconsidered. The analysis of the national case-law considered together with the reasoning of the ECJ on Article 11 (6)-(8) does not suggest that the fault is only incorporated in those provisions itself but rather results from the reluctance of national courts to deal with non-returns which develop into Article 11(6)-(8) proceedings. Rather, the national courts have preferred to approach cases as simple non-returns under Article 13 of the Convention on Child Protection across the EU.[729]

Re D is an excellent example of how effectively Article 11(6)-(8) ***can*** be applied. In *Re D* the English court held that the interrelationship of Articles 10 and 11(7) and (8) of the Regulation allow the state from which the child has been wrongfully removed or retained to assess the custody of the child once a judgment of non-return pursuant to Article 13 of the Convention has been made.[730] It further underlined that proceedings under Article 11(7) should be carried out as quickly as possible with the court exercising a welfare jurisdiction in carrying out the required examination, thereby respecting that the child's welfare is the paramount consideration.

The court issued a certificate for return pursuant to Article 42(2), concluding that this was in the best interest of the child and the guardian had obtained the child's views.[731]

The EU's reasoning in *Povse*[732] that the objective of the provisions of Articles 11(8), 40 and 42 of the Regulation is that the proceedings should be expeditious and that the priority should be given to the jurisdiction of the court of origin was respected in *Re D*.

The analysis has made evident, that tecently, the development in the courts of England and Wales is a practical approach in respect of the return mechanism. The ultimate character of the automatic enforcement mechanism of the Regulation Chapter III, Section 3 has been criticised for being very formalistic

[729] Beaumont, P., Walker, L., Holliday, J., *supra* note 676.
[730] *Re D, supra* note 511.
[731] ibid.
[732] *Povse v Alpago, supra* note 244.

and for relying too much on the hardly existent mutual trust between the Member States. [733]

But this disregards that it is the court of the Member State of origin to decide, when issuing a certificate on the basis of Article 42(2) of the Regulation, whether hearing the child is in his or her best interests.[734] Whilst the party may not bring an appeal against the certified judgment, ordering the return of the child[735] a violation of the child's right to be heard may provide sufficient grounds to overturn a judgment awarding rights of custody.[736] The complementary structure of Article 13 and Article 11(6)-(8) has very shortly before the submission date been harshly criticised by Beaumont, Walker and Holliday in an analysis of the final findings of a research project, as was discussed in detail in Chapter 5. In accordance with what has been found in this thesis, the harsh criticism on the enforcement procedure in the context of child abduction is not supported by the findings herein. However, in the analysis of the empirical study the findings developed in the thesis with regard to Article 11(4) is supported: "*our study shows that this provision is not being used adequately by judges in Member States when applying the Article 13(1)(b) exception. This is clear from the Article 11(8) Brussels IIa cases where it is often suggested that the judge in the State of refuge did not take account of Article 11(4)*."[737]

E. Hearing the child

Whilst the wording of Article 11(2) suggests that hearing the child shall be of high concern, the current status quo is however that the provision has had limited application in the Member States.[738] This is a truly disadvantageous development.

[733] McEleavy, P., *supra* note 536, pp. 147 et seqq. pp. 177 et seqq..
[734] *Zarraga v Pelz, supra* note 444 para. 68.
[735] *Povse v Alpago, supra* note 244, para. 71.
[736] *Zarraga v Pelz, supra* note 444, para. 72.
[737] supra note 676.
[738] as discussed in Chapter 4 B II hereof.

However, as has been pointed out in the preceding chapters,[739] in the analysis of the best interests principle throughout that thesis and particularly in the analysis on the application of the Regulation's provisions on return orders, the more recent case law in England adopted the position that the rights and welfare interests of children are distinct from those of their parents and that a balance between those interests is required. Whilst, under the Convention, a child-centred approach has been rare during the last decades, the more recent English case law has made reference[740] to the concept of hearing a child under the Regulation. Hence, the national procedural rules must be laid out to support the concept set forth in the Regulation and must secure that the child is heard by competent judges and an amendment of the Regulation should impose minimum criteria.

With respect to the Convention, there is growing recognition that the consideration of the child's views becomes more relevant only that "in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases."[741] A reliance on only Article 12 the United Nations Convention on the Rights of the Child (UNCRC) 1989 and Article 24(1) Charter of Fundamental Rights of the European Union Art 24(1) which would be the consequence of a return to the Convention since the latter does not contain an obligation to hear the child would be a step backwards.

It is suggested that the very clear wording in Article 11(2) should be understood as an initiative for the national courts to hear the child concerned both in cases under the Convention and under the ambits of the Regulation. However, in a strict interpretation, the obligation of course only applies to cases under the Regulation and in the analysis of their study Beaumont, Walker and Holliday, underline the findings indicate a rare use of Article 13(2) of the Convention on Child Abduction concerning the views of the child. This concurs with the

[739] Chapter 2 A I 1, 3 A II 1 and 3 A III.
[740] *Re D* (A Child), *supra* note 315.
[741] *Re T, supra* note 541, para 57.

approach the Convention has taken over the past decades with respect to taking into consideration the views of the child.

It can be concluded, that Article 11(2) of the Regulation is an important asset in protecting the best interests.

As delignated further above, whilst the procedural issues should be solved by amendments to the Article 42 certificate, there is no reason for amendments to Article 11(8). Since there is no possibility to appeal against a certificate issued pursuant to Articles 41(1) or 42(1), the courts should be required to clarify the opportunities to be heard were made available to the child, as it is set forth in Article 11(2) and 42(2) (a) and the parties were heard to as is set forth in 42(2) (b). Reasons should be provided on an obligatory basis where the judge considered it was inappropriate to hear the child. Article 42 is an exception to the provision in Article 23(b) which sets forth a ground for non-recognition if the child has not been "given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought." Not the ECJ's judgement is the problem, but rather the inconsistent structure of the rules on recognition and the ultimate character of Article 42 is in conflict with the best interests of the children concerned. Not the ECJ has failed to consider the practical application of the judgement, but rather the wording of Article 42 is so inescapable that it trespasses the interests of the children concerned.

The margin of discretion inherent in the application of national procedural rules and of legislation by the Member States would require genuine mutual trust but under the current system this advancement is beyond what can be realised in practice. Both the lack of mutual trust between Member States' courts which has become evident in *Purrucker I* and *Purrucker II* and the lack of a genuine standard of application of the provisions on non-return orders, recognition and enforcement call for the suggested amendment of Article 42.

In addition to more detailed requirements with respect to the certificate, appeal should generally be permitted before the courts of the Member State of origin if one of the parties considers that the court of the Member State of origin has issued a certificate in violation of Article 42(2) (a).

F. Intervention of the ECtHR

In cases of non-enforcement of Hague return orders, the assessment carried out by the ECtHR as to whether the authorities had done everything that could reasonably be expected to protect the interests of the children concerned convey the impression that the system of the Hague Convention is strengthened in its efforts to returning abducted children.[742]

However, the thesis has shown that this impression is deceiving.

Whilst both the protection of human rights and the preservation of the best interests of children require most careful evaluation, a determination of levels of protection based on generally worded provisions of fundamental rights legislation in terms of applying whatever provision offers the "highest" level of protection seems doomed. Both the Regulation and the Convention on Child Abduction contain *specific* rules that require an autonomous interpretation. Jurisprudence from the ECtHR appeared to support that Article 8 of the European Convention on Human Rights prevailed over the Convention, thereby undermining the functioning of the Convention, and the rulings in *Neulinger*[743] and *Raban*[744] remained discredited among academics and courts.

Also, since there has hitherto been no succession of the European Union's to the ECHR,[745] it is not in the interests of the children concerned if the ECHR undermines legal certainty.

Being one of the four exceptions to the requirement to return to the jurisdiction of habitual residence the grave risk exception of Article 13 (b) has played a significant role in the development of the ECtHR's increasing influence on the interpretation of Convention and Regulation cases.

Whilst it is of course of central importance, as referring to the Convention on Child Abduction, that

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[742] Janzen, U., Gärnter, V., *supra* note 647.
[743] *Neulinger*, *supra* note 601.
[744] *Raban v Romania*, *supra* note 106.
[745] Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=400431.

"*the concept of the child's best interests should be paramount (…)*,"[746]

The ECtHR sought to review the reasoning of the Romanian court and the interpretation adopted in respect of Articles 3 and 13(b) of the Convention on Child Abduction.

In *Re E*[747] the Supreme Court was requested to consider the recent decisions of the European Court of Human Rights and in Germany, the higher regional court cases which hitherto referred to *Neulinger* argued that *Neulinger* did not change their evaluation or the interpretation of Article 13 in the context of the case.[748]

In the English case of *Re T*, Jackson J made clear that in his view *Neulinger* did not require any change to the

"*approach to Hague Convention proceedings whether in terms of principle or procedure."*[749]

And in the case of *Re S* the Supreme Court considered it not right that the European Court of Human Rights had reiterated the suggested requirement of an in-depth examination and considered such requirement "entirely inappropriate".[750]

It can be concluded from the in-depth analysis which has been undertaken in Chapter 4 that the ECtHR's attempt to exercise the function of a reviewing court for the interpretation of the return mechanism under the Regulation and the Convention on Child Abduction has had a very negative influence on the harmonised application of the return mechanism in national courts. The standards set by the European Convention on Human Rights stand independently 'side-by-side' the Regulation, and, as the Regulation contains specific rules at European level and judgements no case law under the Regulation is revisable by the ECtHR.

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[746] *Raban v Romania*, *supra* note 106.
[747] *Re E*, *supra* note 405.
[748] OLG Hamm, *supra* note 619, regarding Article 13 para I b), Artikel 13 para 2; OLG Stuttgart, *supra* note 619.
[749] *Re T, supra* note 622.
[750] *Re S, supra* note 403.

The chapter on the ECtHR's involvement has however revealed difficulties in the return mechanism under the Convention. The major difficulty which arises with respect to Article 13(b) of the Convention is confidence that the structure contained in the Convention will automatically provide the degree of protection required to the children concerned. Whilst a parent's legal representatives might raise issues set forth as exceptions to return or may apply for return and the Convention is based upon principles of comity and mutual trust[751] the different legal systems of the Contracting States pay different regard to instruments such as 'undertakings' and the court might under the national procedural rules not be able to seise jurisdiction upon a child's return.[752]

It is not in the interest of the children concerned to lower the chances to succeed with an Article 13(b) defence by requiring the court to undertake a full examination of best interests of the child - the interpretation of "grave risk" in Article 13(b) requires no consideration of any criteria other than those set forth in the Convention. Whilst this may be considered a legal disadvantage for children in 'simple' Hague cases compared to cases under the Regulation with respect to which Article 11 applies as an additional qualifier, this can only be remedied by amendments to the Convention, not by any case-to-case revision by the ECtHR. In the context of the interrelation, this could be remedied by an improvement of the overriding mechanism, discussed in Chapter 5 B.

From the analysis of the rules on provisional measures it can be concluded that those are indeed progressive and, though complicated, not entirely disadvantageous.

A change of circumstances resulting from a gradual process such as the child's integration into her new environment cannot be considered a sufficient ground

[751] But contrary to the Regulation, the Convention text or the Explanatory Report, *supra* note 104, do not mention those.

[752] Conclusions and Recommendations of the fifth meeting of the special commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the practical implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9. November 2006) adopted by the Special Commission, available at https://assets.hcch.net/upload/concl28sc5_e.pdf.

for the court of the Member State where the child is present to adopt provisional measures. Wrongful removals and detentions shall not be consolidated and the position of the parent responsible for the abduction of the child shall not be supported by procedural advantages.

Compared to the Regulation's features of automatic enforceability of judgments,[753] and the primacy of the Member State of habitual residence in intra-EU abduction cases,[754] the 1996 Convention's provisions have a limited scope.[755] *The clearest distinction is that the Convention on Child Protection deals with issues of applicable law[756] and contains a general choice of law rule for parental responsibility.[757]*

European politics made the Convention on Child Protection a difficult project from the start.[758] It has had a difficult start with very few case law and limited interrelation with the Regulation. It is primarily to the delayed development of ratification that the interrelating cases under the Regulation have been those related to the Regulation's interrelation with the Convention on Child Abduction rather than with the Convention on Child Protection.

G. Final consideration

The recent *Bradbrooke*[759] offers a good summery of how certain shortcomings of the Convention on Child Abduction can be overcome under the Regulation:

"it is apparent from Article 11(3) to (5) of the Brussels II bis Regulation that the return without delay of the child is to be the general rule and that a refusal must remain the exception. Consequently, in the system established by the Brussels II bis Regulation, unlike that arising from the 1980 Hague Convention, where

[753] Articles 40-42 of the Regulation.
[754] Article 10 of the Regulation.
[755] Chapter V of Convention on Child Protection.
[756] Article 15 of the Convention on Child Protection.
[757] Articles 16 -18 of the Convention on Child Protection.
[758] Lowe, N., *supra* note 477, p. 10.
[759] *Bradbrooke, supra* note 429.

the courts concerned oppose return, that does not automatically bring the dispute concerning the return to an end."

But, as was suggested in the chapter on amendments, Chapter 5 C., the approach only works if there are efficient means to 'force' the national courts in the Member States to obey to the provisions and a more obligatory nature of the concept of mutual trust is required. Additionally, amendments to the procedural structure would make the application of the previsions more efficient.

Mutual trust is a foundation of Brussels II *bis*. In accordance with that principle, every court of a Member State offers an equivalent and effective level of judicial protection and the application of the provisions of the Regulation is partially, but not wholly, as some have suggested, dependent on the functioning of mutual trust.

Brussels II *bis* stands for

"*certainty and avoidance of litigation against opportunities for fairness and justice, for reconciliation and conciliation*",[760]

and provides a complete set of jurisdiction rules on parental responsibility, and whilst the complementary nature of provisions on child abduction and return order as well as the related provisions on recognition and enforcement have complicated the nature of such proceeding the general conclusion is that the respective provisions strengthen the framework under the Convention on Child Abduction.

It must never be neglected that family not commercial interests are at stake. As Schlosser suggests, [761] Brussels II *bis* are 'innovative and efficient concepts of judicial cooperation'[762] but the international impact must not be disregarded and there should either be a complete separation of the Regulation from the

[760] Hodson, D., Green, M., 'Has the SFLA code met its Waterloo?' (2001) Solicitor's Journal, 145(9), 214-215, 217.
[761] Hess, B., Pfeiffer, T., Schlosser, P., Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, September 2007, *supra* note 206, p.349.
[762] ibid, p.27.

Convention on Child Abduction or the underlying procedural rules of the Regulation must be adopted to clarify the complementary nature.

The thesis has shown that the Regulation has served to address some of the difficulties that were inherent in the operation of the Convention on Child Abduction, and by doing so it has promoted to respect the best interests approach. The discussion and case-law analysis in relation to the areas which were identified as giving rise to concern have shown that the ECJ has provided valuable guidance on the application of the provisions, in the best interests of the child(ren) concerned. On the other hand, the complementary system of the Regulation and, mainly the Convention on Child Abduction, complicated the application of the Regulation and parallel proceedings under the Convention and the Regulation impede a swift and straightforward application.

But common criticism regarding the alleged misuse of the Art 13(b) exception, the interpretation of Article 20 and measures available to protect abducting parents upon return, has been disconfirmed in this thesis. Certain critical issues such as the determination of the settlement of the child in the new environment, the lack of application of certain provisions in the national courts and procedural obligations of courts require amendments.

For strengthening the summary return mechanism of the Convention on Child Abduction the provisions in the Regulation are generally well suited and it is in the interests of the children concerned that the Regulation entrusts the courts of the Member State where the child was habitually resident before the wrongful removal or retention with the judicial procedures. Notwithstanding the adoption of provisional measures by other courts, it is for the courts of the former habitual residence to determine the measures which are necessary to protect the best interests of the child. The ECJ in its interpretation of Brussels II *bis* made the latter an efficient instrument in deterring wrongful removals and retentions. *As Rinau, Povse and Zarraga*[763] have demonstrated, the Regulation must be interpreted to avoid that the parent responsible for the wrongful removal or

[763] *Rinau*, *supra* note 19; *Povse supra* note 246 and *Zarraga v Pelz, supra* note 444.

retention is supported procedurally. Also, Detiček[764] has supported that provisional measures shall never operate as means of circumventing jurisdiction rules that apply in the event of the wrongful removal or retention. Contrary to the system under the Convention on Child Abduction, it is not for the court of the Member State of enforcement but for the court of the Member State of origin to decide, which, as this thesis has shown, is clearly an asset.

Whilst the Hague Conference regularly discusses improvements and difficulties of the Conventions, the case-law has over decades been dominated by national differences and there have been tendencies of a child-centred, a balanced and a parent-focused interpretation of the major concepts. This is a clear weakness of the Convention on Child Abduction.

As for the Regulation, it has partially overcome those tendencies inherent to different interpretations. The objective stated in the Preamble to "serve the protection of the children's best interests" has been met, with exceptions. It may be concluded that under English case law the children concerned have benefited from the application of the Regulation.

It is not just in accordance with the ECJ's rulings but also in the interest of the children concerned that the interpretation of any concept in the Regulation unless explicitly stated therein is not undertaken under national law, but should be accorded an "autonomous" meaning under the Regulation, thereby providing for legal clarity and certainty.

Bohez v Wiertz[765] reinforced that the Regulation

"is based on the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at EU level".

The Regulation sets the grounds for a progressive approach of the courts to respecting the children's interests in parental responsibility and

[764] *Detiček*, *supra* note 239
[765] Case C‑4/14, *Bohez v Wiertz.*

abduction/retention cases, to the extent this is possible by an efficient allocation of jurisdiction, recognition and enforcement. Goodwill of the national courts as to the application and interpretation of the Regulation is however required. In particular, innovative concepts such the obligation to hear the child and the further restrictions to exceptions on return the Regulation imposes require such goodwill. Initiative to applying the new concepts and dispensing of the discretion offered under the Convention on Child Abduction is necessary. Through the legal certainty and stringent overall structure together with the guidance the ECJ has given the intra-Community framework has undoubtedly improved the situation with respect to parental responsibility and custody, for the children involved.

The interrelation and the complementary nature of the provisions in the Regulation and, in particular, the Convention on Child Abduction, have created a complicated structure reflected in the national case-law and the ECJ case-law, however, despite this interrelation, the Regulation overcomes many pitfalls of the Convention. Hence, it is concluded, that the advantages outweigh the disadvantages which result from the complexity of the interrelation and from flaws of the rules and, to return to the original question posed by this research, in general, the majority of the Regulation's provisions are not to the detriment of the 'best interests' of the children concerned but, if applied diligently and in accordance with selected guidance by the ECJ, promote the best interests approach of the Regulation.

Postscript

1. Introduction

The EU Commission on 30 June 2016 presented a proposal for a recast of Brussels II *bis*[1], based on the findings in its Report and the Public Consultation mentioned in the main part of the thesis.[2] At the time of the final submission and prior to the submission, there had, as is usual with respect to Commission Proposals, not been reliable indication that a Proposal would be published. Two years had passed between the Public Consultation initiated by the Commission in 2014 and the publication of the Proposal. At the time this Postscript is written, a recast of Brussels II *bis* has still not been presented. However, the suggested amendments are of relevance to the thesis as the proposed changes to the present Brussels II *bis* regime would lead to certain changes in the context of the procedure in parental responsibility and child abduction cases and hence possibly have an impact on the (best) interests of the children concerned.

2. Alleged aims of the Proposal

As far as the objectives for the suggested amendments are concerned pursuant to the Proposal, the issues of procedural complexity have formally been acknowledged and are considered in the context of the children's best interests. In the Explanatory Memorandum it is stated that "*[t]he objective of the recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust by removing the remaining obstacles to the free movement of judicial decisions in line with the principle of mutual recognition and to better protect the*

[1] Proposal for a COUNCIL REGULATION on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), 30 June 2016, COM(2016) Final 411.
[2] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM (2014) 225 final.; EU PUBLIC CONSULTATION ON THE OPERATION OF COUNCIL REGULATION (EC) No 2201/2003 and to the REPORT FROM THE COMMISSION ON THE APPLICATION OF COUNCIL REGULATION (EC) No 2201/2003, http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm, last accessed 20 May 2017.

best interests of the child by simplifying the procedures and enhancing their efficiency."[3]

As mentioned in the thesis[4] the ambitions of the Commission with respect to a particular area of law have during the last years depended on the identification of problems in the application of the existing legislation and the alleged significance of changes, and hence, issues of immediate concern prevail over any other matters. The Commission's Political Guidelines of 2014 identify the significance of improving judicial cooperation and mutual recognition of judgments,[5] an issue also discussed in the thesis in particular in the context of the return order procedures.[6]

The Proposal presents a new recital 13
"*The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped* ***in the light of the best interests of the child*** *and should be applied in accordance with them. Any reference to the best interests of the child should be interpreted* in light *of Article 24 of the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child of 20 November 1989.*" [emphasis added]

Such reference demonstrates the emphasis the Commission again wishes to lay on a consideration of the best interests of the children by the courts, especially in the context of the protection of fundamental rights.

3. Identification of issues of concern

The Explanatory Memorandum of the Proposal recognizes that some issues with respect to the provisions on parental responsibility require amendments of the respective provisions.

[3] *Explanatory Memorandum* of the Proposal, *supra* note 1, p. 2.
[4] Chapter 5 A.
[5] Political Guidelines, http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf, last accessed 01 May 2017, the Guidelines are also referred to in the Proposal.
[6] Chapter 4 and 5.

With regard to the return procedure, the failure to ensure the immediate return of the children concerned and the inefficiency of return proceedings is identified and the problems recognized are that (i) the six-week time limit to issue a return order has brought about uncertainty, (ii) the current Regulation sets no time limit for processing an application by the receiving Central Authority, (iii) in domestic law, there is a lack of limitation of the number of appeals that can be brought against a return order, and (iv) , in several Member States, a lack of specialisation of the courts dealing with return applications in several Member States.[7] Those are the central issues of concern regarding the Regulation which are also identified and analysed in the thesis.[8]

Furthermore the Proposal identifies the problems of the “overriding mechanism” which are referred to and assessed in Chapter 4.B I. and II. and mentions that the practical application has proven difficult.

Furthermore, the Proposal refers to the delays in the procedure for declaring a decision given in another Member State enforceable, which may take up to several months, depending on the jurisdiction and the complexity of the case, and the problems of several, including parallel proceedings,[9] issues which are discussed in detail in Chapter 3 and 4.A and D of the thesis.

The Explanatory Memorandum of the Proposal recognizes the need that children are heard and identifies as an issue of concern that the Member States have varying standards concerning the hearing of the child, leading to inequality and uncertainty and in consequence endangering the best interests of the children concerned,[10] an issue analysed in detail in Chapter 4.B. I.-III., and in Chapter 5.B and Chapter 6.

Furthermore, the Explanatory Memorandum recognizes as an issue that “decisions on parental responsibility are often enforced late or not at all”[11]

[7] *Explanatory Memorandum* of the Proposal, *supra* note 1, p. 3, 6.
[8] Chapter 5.B, 3.A.IV. [now 3.A.V. ?], 4.D.II, 5.C. [Would it not be worth mentioning which aspect was considered in which part as it does not seem to be in the same order of appearance?]
[9] *Explanatory Memorandum* of the Proposal, *supra* note 1, p. 5, 8.
[10] *Explanatory Memorandum* of the Proposal, *supra* note 1, p. 4.
[11] *Explanatory Memorandum* of the Proposal, *supra* note 1, pp. 5, 6, 8.

pertaining to differences in national procedures, as discussed in detail in the thesis in Chapter 3.A.IV.-V., Chapter 4 A.-C., Chapter 5.C. and Chapter 6. An enhancement of cooperation between the Central Authorities is also envisaged as a cornerstone amendment in the analysis in those sections and in the conclusion of the thesis and an improvement to the rules on cooperation as suggested in the Proposal would potentially prove very valuable.

With respect to the direct interrelation of the Regulation with the Convention on Child Abduction and Child Protection, under the topic "Consistency with existing policy provisions in the policy area" the Explanatory Memorandum does not refer to the many aspects of interrelation discussed in the thesis but refers to the priority in regulating the jurisdiction and the recognition and enforcement of decisions. It simply states that "*Both in intra-EU cases and cases in relation to third States, the law applicable to parental responsibility matters is determined by the 1996 Hague Convention*"[12], hence with regard to applicable law, everything shall remain 'as it is'. It refers to *Rinau* also envisaging a harmonization by enhancing the actual compatibility of the procedural rules applicable in the Member States, an aspect explicitly suggested in the thesis.[13]
As stated therein, the Commission's Proposal is based on a Final Evaluation Report and Analytical Annexes[14], as well as two surveys.[15]

It is suggested in the Proposal[16] and can also be concluded from the findings in Chapter 5 of the thesis that the Regulation is considered to be functioning well in general but that there are legal issues owing to the fact that the text is unclear or incomplete, as the discussion of the main aspects in the above has shown.

[12] *Explanatory Memorandum* of the Proposal, *supra* note 1, p. 5.
[13] Chapter 6.
[14] Study on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment; see
Final Evaluation Report at
http://ec.europa.eu/justice/civil/files/bxl_iia_final_report_evaluation.pdf, last accessed 02 May 2017.
[15] Proposal, *supra* note 1, p. 9.
[16] Proposal, supra note 1, p. 9.

The Proposal further takes into consideration the results of the Public Consultation[17], the consensus of which was that there is the need for a carefully targeted reform of the existing Regulation.

It appears from the explanations provided that the Commission considered a broad spectrum of sources, opinions from experts, parents, Member States, data, evaluations of studies and surveys and furthermore an impact assessment was part of the preparation of the Proposal.

4. Suggestions for amendments

The Proposal also contains the main results of the impact assessment, some of which are discussed in Chapter 5 and Chapter 6 of the thesis, to the extent presented before the submission.[18] With respect to the central aspect of the thesis, the interrelation, in the context of to the child abduction procedures, clarifications of the current mechanism, options to possible “radical changes” of the return mechanism, including the return to only the Convention on Child Abduction and the exclusive forum in the Member State of origin are considered in Chapter 5 C.

Regarding recognition and enforcement, options discussed in the Proposal consider the elimination of the exequatur and with respect to enhancing the procedure on hearing the child three options have been considered.[19] Whilst they criticize the limited scope of the suggested amendments, Beaumont, Walker and Holliday refer to the benefits of the concentrated jurisdiction pertaining to efficiency and expertise, and to the limited possibility of appeals which may reduce the average time for the return of the child in the long run.[20]

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[17] Study, supra note 14, p. 127.
[18] *Explanatory Memorandum* of the Proposal, supra note 1, pp. 9-11.
[19] *Explanatory Memorandum* of the Proposal, supra note 1, pp. 9-11.
[20] Beaumont, P., Walker, L., Holliday, J.; “Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the Effect of Brexit on Future Child Abduction Proceedings”, Working Paper No. 2016/6, p. 3; http://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2016_6_revised.pdf, last accessed 01 May 2017.

In the suggested rules,[21] clarification is sought with respect to the time limit and the Commission proposes to apply a six-week time limit to the work of the Central Authorities as well as to the proceedings before the first instance court and the appellate court respectively. Overall this would thus amount to a maximum 18 week period for all stages, which would indeed be valuable.

In addition, the jurisdiction for child abduction cases would be limited to a number of courts, which, in terms of specialization of courts, is also a suggestion for enhancement discussed in Chapter 3 and Chapter 4 C of the thesis.

It is proposed to limit the number of possibilities to appeal a decision on return to one and it would be left to the judge to decide whether a decision ordering return should be provisionally enforceable.

It would be an obligation of the Member State where the child was habitually resident before the wrongful removal or retention to conduct a thorough examination of the best interests of the child before a final custody decision, including a hearing of the child, which is identified as a measure of improvement in the thesis.

As discussed in Chapter 4 C of the thesis any measure to improve the direct cooperation between the courts should be welcomed to improve the proceedings and hence the suggestions of the Proposal relating thereto are considered an advancement. It would be possible for the court of the Member State of refuge to order urgent protective measures which would be recognised by operation of law in the Member State where the child was habitually resident immediately before the wrongful removal or retention. These measures would be valid until the court in the state of habitual residence orders measures.[22]

In the new Regulation, the *exequatur* procedure would be eliminated for all decisions covered by the Regulation's scope, but there are procedural measures

[21] The most relevant rules of the proposed recast Regulation are reproduced in an attachment hereto, those are part of the Proposal, supra note 1.
Six-week time limits are included in the suggested Art. 32 (4) with regard to enforcement and in Art. 63 (1)(g) with regard to returns.
[22] Proposal, supra note 1, suggested Art. 12(1).

to secure the defendant parent's rights and remedies. In furtherance of this there would be defined situations in which enforceability and enforcement as such could be opposed.

The Proposal does not suggest any changes to the individual Member States' rules and practices on how a child shall be heard and solely requires mutual recognition between the legal systems.

Several measures would be introduced to address the at times inefficient enforcement whilst the application for enforcement has to be made to a court in the Member State of enforcement, the procedure, the means of enforcement would be in accordance with the law of the Member State of enforcement, all under the national law of the Member State of enforcement.

According to the new suggested Article 36, if enforcement would allegedly not be in the child's best interests it could be stayed. The proposal further provides that a decision could be declared provisionally enforceable even if the national law would not foresee such provisional enforceability.

In terms of cooperation, the obligations with respect to the Central Authorities' and other authorities' tasks could prove valuable.[23] Beaumont, Walker and Holliday argue that those proposed changes could make Central Authorities more efficient and argue that it would be easier for the Commission to bring proceedings against a Member State if the required measures are not implemented.[24]

In summary, the proposed changes have potential to improve the rights of the children involved in parental responsibility cases and four of the six addressed issues of concern are related to the enforcement of decisions. There is not only a separate provision on the obligation for courts to give children the opportunity to be heard (Art. 20), which is not a fundamental improvement as such, as a provision exists in Brussels II bis but there are also suggestions to improve the efficacy of return proceedings in cases of child abduction by limiting jurisdiction for these procedures on a limited number of courts in a Member State

[23] Proposal, supra note 1, suggested Articles 14, 25(1), 63.
[24] Supra note 20, p. 13.

(Art. 22) and the above described changes to the return procedures (Art. 25) and a limitation of the number of appeals to one (Art. 25(4)). In furtherance of this there is the repeatedly referred to six-week time frame. The proposed mechanism to request the refusal of recognition or enforcement (Arts. 40-42) is similar to the mechanism in Brussels I *bis* (Regulation 1215/2012) and an enhancement to the existing problems under Brussels II *bis* thus foreseeable in this respect.

5. Impact of the Brexit

After the final official submission of thesis the first change occurred when the Proposal was published and second a fundamental change occurred, when the decision on the Brexit was taken. The second occurrence, after the viva, was the official initiation of the Brexit, when on Wednesday March 29 2017, Prime Minister Theresa May triggered Article 50 saying: "*This is a historic moment from which there can be no turning back. Britain is leaving the European Union*."[25]

It is of significance that according to the recital 30 (adapted), which is the new recital 55 "*[t]he United Kingdom and Ireland are not taking part in the adoption of this Regulation and are not bound by it or subject to its application*." but then again in a written ministerial statement on 27 October 2016, the Minister for Courts and Justice, stated: "*the Government have today decided to opt in to the European Commission's proposal which repeals and replaces regulation 2201/2003, also known as the Brussels IIa regulation, on cross-border family matters*". Hence, formally, the UK decided to opt in under Article 3 of Protocol 21 of the EU Treaty. The Minister further stated that "*[n]otwithstanding the result of the referendum on EU membership the Government consider it is in the UK's interests to opt in to this proposal* […] *even after a UK exit from the European Union, the Regulation may affect UK citizens*" and eventually added that "*[d]uring the negotiations the Government will aim to make sure that what is agreed respects national competence, limits any impacts on domestic law and procedures and minimises any additional burdens on the courts and the authorities that will use the new regulation*"[26] it is unclear how the negotiations will develop.[27]

[25] http://www.reuters.com/article/us-britain-eu-idUSKBN16Z22G, last accessed 02 May 2017.
[26] HCWS225 27 October 2016, available at https://hansard.parliament.uk/commons/2016-10 27/debates/16102729000011/BrusselsLlaRegulationOnFamilyLaw, last accessed 01 May 2017
[27] Subsequent to the publication of the Proposal, the decision of the UK to leave the European Union has an additional impact on the further developments in the area of private international law concerning parental responsibility and child abduction which is unforeseeable; this aspect will be addressed further below.

According to Beaumont, Walker and Holliday, the possibility provided for by the UK Government in its White Paper on Brexit should not lead to any transitional arrangements for future cooperation on civil justice matters in the area of conflict of law provisions regarding children.[28]

The authors argue that there no such necessity owing to the fact that "*the legal regime provided by the three Hague Conventions will apply to our relations with the EU Member States immediately that the EU Regulations cease to apply*." and argue that the fall-back to the Convention on Child Abduction will be a good solution.[29]

Whatever the UK will decide, the current Regulation or its recast will continue to apply in all current Member States except Denmark and if the Proposal would lead to the Brussels II recast the improvements detailed further above would apply, including those to the overriding mechanism which is considered vital in the context of ensuring that best interests of the children concerned.

[28] Ibid.
[29] Supra note 20.

Annex - Excerpts from the Proposal

PARENTAL RESPONSIBILITY

Article ~~8~~ 7

General jurisdiction

1. The ~~courts~~ ⌦ authorities ⌫ of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State ~~at the time the court is seised~~. ⇨ Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the authorities of the Member State of the new habitual residence shall have jurisdiction. ⇦

2. Paragraph 1 shall be subject to the provisions of Articles ~~9~~ 8, ~~10~~ 9 and ~~12~~ 10.

Article ~~9~~ 8

Continuing jurisdiction ~~of the child's former habitual residence~~ ⌦ in relation to access rights ⌫

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the ~~courts~~ ⌦ authorities ⌫ of the Member State of the child's former habitual residence shall~~, by way of exception to Article 8,~~ retain jurisdiction ~~during a three-month period~~ ⌦ , for three months ⌫ following the move~~, for the purpose of modifying~~ ⌦ to modify ⌫ a ~~judgment~~ ⌦ decision ⌫ on access rights ~~issued~~ ⌦ given ⌫ in that Member State before the child moved~~, where~~ ⌦ if ⌫ the ~~holder of~~ ⌦ person granted ⌫ access rights ~~pursuant to~~ ⌦ by ⌫ the ⌦ decision ⌫ ~~judgment on access rights~~ continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the ~~courts~~ ⌦ authorities ⌫ of the Member State of the child's new habitual residence by participating in proceedings before those ~~courts~~ ⌦ authorities ⌫ without contesting their jurisdiction.

Article ~~10~~ 9

Jurisdiction in cases of child abduction

In case of ⌦ the ⌫ wrongful removal or retention of the child, the ~~courts~~ ⌦ authorities ⌫ of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in ~~paragraph~~ point (i);

⇩ new

(iii) a request for return lodged by the holder of rights of custody was refused on grounds other than Article 13 of the 1980 Hague Convention;

Article ~~20~~ 12

Provisional, including protective, measures

1. In urgent cases, ~~the provisions of this Regulation shall not prevent~~ the ~~courts~~ ⌦ authorities ⌫ of a Member State ⇨ where the child or property belonging to the child is present shall have jurisdiction to take ⇦ ~~from taking such~~ provisional, including protective, measures in respect of ~~persons~~ ⇨ that child ⇦ or ~~assets~~ ⇨ property ⇦ ~~in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter~~.

⇩ new

In so far as the protection of the best interests of the child so requires, the authority having taken the protective measures shall inform the authority of the Member State having jurisdiction under this Regulation as to the substance of the matter, either directly or through the Central Authority designated pursuant to Article 60.

Article 24

⌦ Hearing of the child in return proceedings under the 1980 Hague Convention ⌫

~~2.~~ When applying Articles 12 and 13 of the 1980 Hague Convention, ~~it~~ ⌦ the court ⌫ shall ~~be~~ ensure~~d~~ that the child is given the opportunity to ⌦ express his or her views in accordance with Article 20 of this Regulation ⌫ ~~be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity~~.

Article 25

⌦ Procedure for the return of a child ⌫

41. A court cannot refuse to return a child on the basis of point (b) of the first paragraph of Article 13~~b~~ of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

⇩ new

To this end the court shall:

(a) cooperate with the competent authorities of the Member State where the child was habitually resident immediately before the wrongful removal or retention, either directly, with the assistance of Central Authorities or through the European Judicial Network in civil and commercial matters, and

(b) take provisional, including protective, measures in accordance with Article 12 of this Regulation, where appropriate.

↓ 2201/2003 (adapted)

~~5~~2. A court can~~not~~ refuse to return a child ~~unless~~ ⌦ only if ⌫ the person who requested the return of the child has been given an opportunity to be heard.

⇩ new

3. The court may declare the decision ordering the return of the child provisionally enforceable notwithstanding any appeal, even if national law does not provide for such provisional enforceability.

4. Only one appeal shall be possible against the decision ordering or refusing the return of the child.

5. Article 32(4) shall apply accordingly to the enforcement of the return decision given under the 1980 Hague Convention.

↓ 2201/2003 (adapted)

Article 26

⌦ Refusal to return the child under the 1980 Hague Convention ⌫

⇩ new

1. In a decision refusing to return the child, the court shall specify the article or articles of the 1980 Hague Convention upon which the refusal is based.

↓ 2201/2003 (adapted)
⇨ new

~~6~~2. ⌦ Where a decision refusing to ⌫ ~~If a court has issued an order on non-~~return ⌦ the child was based on at least one of the grounds referred to in ⌫ ~~pursuant to~~ Article 13 of the 1980 Hague Convention, the court ~~must~~ ⌦ shall ⌫ immediately either directly~~,~~ ~~or~~ through its ~~e~~Central ~~a~~Authority ⇨ or the European Judicial Network in civil and commercial matters ⇦ , transmit a copy of ~~the court order on non-return~~ ⌦ that decision ⌫ and of the ⌦ other ⌫ relevant documents, in particular a transcript of the hearings before the court, to the court ~~with~~ ⌦ having ⌫ jurisdiction or ⌦ to the ⌫ ~~e~~Central ~~a~~Authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention~~, as determined by national law~~.

Article 32

Competent courts and enforcement procedure

1. The application for enforcement shall be submitted to the court competent for enforcement under the national law of the Member State of enforcement. These courts shall be communicated by each Member State to the Commission pursuant to Article 81.

2. The court shall take all steps necessary to ensure that the decision is enforced including the following:

(a) to order the concrete enforcement measures to be applied;

(b) to adapt the decision in accordance with Article 33 if necessary;

(c) to instruct the enforcement officer.

3. No grounds for refusal of recognition or enforcement may be examined at this stage unless an application under Article 39 or Article 41 for refusal of recognition or enforcement is filed.

4. Where the decision was not enforced within six weeks from the moment the enforcement proceedings were initiated, the court of the Member State of enforcement shall inform the requesting Central Authority in the Member State of origin, or the applicant, if the proceedings were instituted without Central Authority assistance, about this fact and the reasons.

Article ~~48~~ 33

~~Practical arrangements for the exercise of rights of access~~ ⌦ Adaptation of decision ⌫

⇩ new

1. Where necessary, the courts of the Member State of enforcement may specify the necessary details for enforcement and make any adaptations required for enforcing the decision, provided that the essential elements of this decision are respected.

🡻 2201/2003 (adapted)

~~1.~~ ⌦ In particular, ⌫ ~~T~~the courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or ~~have~~ not sufficiently been made in the ~~judgment delivered~~ ⌦ decision given ⌫ by the ~~courts~~ ⌦ authorities ⌫ of the Member State having jurisdiction as to the substance of the matter ~~and provided the essential elements of this judgment are respected~~.

~~2.~~ The practical arrangements made pursuant to ~~paragraph 1~~ the second subparagraph shall cease to apply pursuant to a later ~~judgment~~ ⌦ decision ⌫ by the courts of the Member State having jurisdiction as to the substance of the matter.

⇩ new

2. Where a decision contains a measure or an order which is not known in the law of the Member State of enforcement, the courts of that Member State shall adapt that measure or order, to the extent possible, to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.

Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

Article 36

⌦ Stay of enforcement proceedings ⌫

⌦ 1. Without prejudice to Article 40, the court in the Member State of enforcement shall, upon application of the person against whom enforcement is sought, stay the enforcement proceedings ⌫ ⇨ where the enforceability of the decision is suspended in the Member State of origin. ⇦

⇩ new

2. Upon application of the person against whom enforcement is sought, the court in the Member State of enforcement may stay the enforcement proceedings where due to temporary circumstances such as serious illness of the child, enforcement would put the best interests of the child at grave risk. Enforcement shall be resumed as soon as the obstacle ceases to exist.

Article 42

Procedure for refusal of enforcement

1. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State of enforcement.

2. The applicant shall provide the court with a copy of the decision and, where necessary, a translation of the decision in accordance with Article 69 or a transliteration of it.

The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them.

Where the court considers it unreasonable to require the applicant to provide them, it may require the other party to provide those documents.

3. The party seeking the refusal of enforcement of a decision given in another Member State shall not be required to have a postal address in the Member State of enforcement.

That party shall be required to have an authorised representative in the Member State of enforcement only if such a representative is mandatory irrespective of the nationality or the domicile of the parties.

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